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No. 04-04 394

In The

Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

GARY BRADFORD CONE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

I.

By conducting a statutorily mandated review of a death sentence to determine, *inter alia*, whether the sentence was "imposed in any arbitrary fashion," can a state supreme court be said to have made an implicit "adjudication on the merits" for purposes of 28 U.S.C. §2254(d) of a federal habeas petitioner's claim alleging that the trial court's jury instructions concerning a statutory aggravating circumstance were unconstitutionally vague, even though no such claim was ever presented to the state supreme court or expressly passed on by it?

II.

Three years before the Tennessee Supreme Court's decision on direct appeal in Cone's case, the state court, in *State v. Dicks*, 615 S.W.2d 126 (Tenn. 1981), expressly adopted a narrowing construction of Tennessee's "heinous, atrocious or cruel" aggravating circumstance approved by this Court in *Proffitt v. Florida*, 428 U.S. 242 (1976). Did the Tennessee Supreme Court's failure to cite *Dicks* in its opinion affirming Cone's death sentence on direct appeal render its decision "contrary to" controlling United States Supreme Court precedent, particularly in light of the fact that Cone never presented any challenge to the "heinous, atrocious or cruel" aggravating circumstance to that court?

STATEMENT OF INTERESTED PARTIES

All parties to this case are named in the caption. No party to this petition is a non-governmental corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of the Rules of this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
STATEMENT OF INTERESTED PARTIES	ii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS AND ORDERS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
I. Procedural History	3
II. Facts Relevant to the Petition	6
III. The Opinions Below	8
REASONS FOR GRANTING THE WRIT	10
I. BY DEPRIVING THE STATE COURTS OF A FAIR OPPORTUNITY TO PASS UPON AND CORRECT THE ISSUE UPON WHICH HABEAS RELIEF WAS GRANTED, THE DECISION OF THE SIXTH CIRCUIT IS CONTRARY TO THIS COURT'S DECISIONS IN *BALDWIN V. REESE* AND *DUNCAN V. HENRY*	10
II. THE SIXTH CIRCUIT'S ADOPTION OF THE "IMPLICIT REVIEW" DOCTRINE TO ELIMINATE CONE'S STATE-COURT PROCEDURAL DEFAULT AND REACH THE MERITS OF HIS CHALLENGE TO THE "HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE CONFLICTS WITH THE HOLDINGS OF FOUR OTHER CIRCUITS	17

TABLE OF CONTENTS – Continued

Page

III. THE SIXTH CIRCUIT'S DECISION GRANTING HABEAS CORPUS RELIEF ON CONE'S EIGHTH AMENDMENT VAGUENESS CHALLENGE TO THE "HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE, DESPITE THE TENNESSEE SUPREME COURT'S PRIOR ADOPTION OF A CONSTITUTIONALLY PERMISSIBLE NARROWING CONSTRUCTION EXPRESSLY APPROVED BY THIS COURT, EXCEEDS ITS AUTHORITY UNDER 28 U.S.C. §2254(d) AND IS CONTRARY TO THIS COURT'S DECISIONS IN *PROFFITT V. FLORIDA* AND *GODFREY V. GEORGIA* 20

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Baldwin v. Reese, 124 S. Ct. 1347 (2004) 10, 11, 12

Beam v. Paskett, 3 F.3d 1301 (9th Cir. 1993) 18

Bell v. Cone, 535 U.S. 685 (2002) 5, 6, 8, 21

Buchanan v. Angelone, 522 U.S. 269 (1998) 16

Coe v. Bell, 161 F.3d 320 (6th Cir. 1999) 16

Cone v. Bell, 243 F.3d 961 (6th Cir. 2001) 5

Cone v. Bell, 359 F.3d 785 (6th Cir. 2004) 9, 10, 15, 16

Cone v. State, 927 S.W.2d 579 (Tenn. Crim. App.), *cert. denied*, 519 U.S. 934 (1996) 5

Cone v. Tennessee, 467 U.S. 1210 (1984) 4

Cone v. Tennessee, 488 U.S. 871 (1988) 4

Duncan v. Henry, 513 U.S. 365 (1995) 11, 12, 13

Engle v. Isaac, 456 U.S. 107 (1982) 11, 17

Godfrey v. Georgia, 446 U.S. 420 (1980) 20, 23, 25

Gregg v. Georgia, 428 U.S. 153 (1976) 23

Jones v. United States, 527 U.S. 373 (1999) 14

Julius v. Johnson, 840 F.2d 1533 (11th Cir. 1988) 18

Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) 11

Kornahrens v. Evatt, 66 F.3d 1350 (4th Cir. 1995), *cert. denied*, 517 U.S. 1171 (1996) 17, 18

Lindh v. Murphy, 521 U.S. 320 (1997) 26

Martinez-Villareal v. Lewis, 80 F.3d 1301 (9th Cir. 1996) 18

Maynard v. Cartwright, 486 U.S. 356 (1988) 10, 24

TABLE OF AUTHORITIES – Continued

Page

Mu'min v. Pruett, 125 F.3d 192 (4th Cir. 1997)..... 18

Nave v. Delo, 62 F.3d 1024 (8th Cir. 1995)..... 14, 19

O'Sullivan v. Boerckel, 526 U.S. 838 (1999)..... 11, 12

Oxford v. Delo, 59 F.3d 741 (8th Cir. 1995)..... 19

Pritchett v. State, 621 S.W.2d 127 (Tenn. 1981)..... 25

Proffitt v. Florida, 428 U.S. 242 (1976).....20, 21, 22, 23, 25

Ring v. Arizona, 536 U.S. 584 (2002)..... 16

Romano v. California, 512 U.S. 1 (1994)..... 16

Rose v. Lundy, 455 U.S. 509 (1982)..... 11

Shell v. Mississippi, 498 U.S. 1 (1990)..... 10

State v. Berry, No. M2001-02023-CCA-R3-DD, 2003 WL 1855099 (Tenn. Crim. App. Apr. 10, 2003)..... 13

State v. Carter, 988 S.W.2d 145 (Tenn. 1999)..... 13

State v. Cone, 665 S.W.2d 87 (Tenn. 1984)..... 4, 6, 8,21

State v. Dicks, 615 S.W.2d 126 (Tenn. 1981).. 21, 22, 24, 25

State v. Stephenson, 878 S.W.2d 530 (Tenn. 1994)..... 14

Wainwright v. Sykes, 433 U.S. 72 (1977)..... 9, 18

Walton v. Arizona, 497 U.S. 639 (1990)..... 25

West v. State, 19 S.W.3d 753 (Tenn. 2000)..... 14, 15, 16

Williams v. Taylor, 529 U.S. 362 (2000)..... 22, 24

STATUTES

28 U.S.C. §1254(1)..... 1

28 U.S.C. §2254(b)..... 10

28 U.S.C. §2254(b)(1)..... 1

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. §2254(d).....2, 13, 20, 21, 26

28 U.S.C. §2254(d)(1)..... 9, 22

Tenn. Code Ann. §§39-2-203(i)(2) (1975 & Supp. 1980)..... 4

Tenn. Code Ann. §§39-2-203(i)(3) (1975 & Supp. 1980)..... 4

Tenn. Code Ann. §§39-2-203(i)(5) (1975 & Supp. 1980)..... 4, 20

Tenn. Code Ann. §§39-2-203(i)(6) (1975 & Supp. 1980)..... 4, 15

Tenn. Code Ann. §39-2-205(c) (1982)..... 2, 9

Tenn. Code Ann. §39-2-205(c)(1) (1982)..... 13

Tenn. Code Ann. §39-2-205(c)(2)..... 13

OTHER AUTHORITY

Tenn. R. App. P. 13(b)..... 14

PETITION FOR WRIT OF CERTIORARI

The Office of the Attorney General of Tennessee, on behalf of Ricky Bell, Warden, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit reversing and remanding this case to the district court with instructions to issue a writ of habeas corpus vacating respondent's two death sentences for first degree murder.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App. 1) is published at 359 F.3d 785. The memorandum opinion of the district court relevant to Cone's challenge to the "heinous, atrocious or cruel" aggravating circumstance (App. 43) is unreported.

JURISDICTION

The judgment and opinion of the court of appeals were entered on March 1, 2004. (App. 1). Petitioner's timely request for rehearing was denied on June 22, 2004. (App. 105). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2254(b)(1) provides in pertinent part:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the

judgment of a State court shall not be granted unless it appears that –

> (A) the applicant has exhausted the remedies available in the courts of the State. . . .

28 U.S.C. §2254(d) provides in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

Tenn. Code Ann. §39-2-205(c) (1982) (repealed) provided in pertinent part:

> (b) The appeal of the conviction for first-degree murder and the review of the sentence of death shall have priority over all other cases and shall be heard according to the rules promulgated by the Tennessee Supreme Court. The Tennessee Supreme Court shall first consider any errors assigned and then the court shall review the sentence of death.
>
> (c) In reviewing the sentence of death for murder in the first degree, the Tennessee Supreme Court shall determine whether:
>
> > (1) The sentence of death was imposed in any arbitrary fashion;

> > (2) The evidence supports the jury's findings of a statutory aggravating circumstance or statutory aggravating circumstances;
> >
> > (3) The evidence supports the jury's finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance or circumstances so found; and
> >
> > (4) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant. . . .

(App. 106)

STATEMENT OF THE CASE

I. Procedural History

Respondent Gary Bradford Cone ("respondent" or "Cone") was convicted by a jury in 1982 in the Criminal Court of Shelby County, Tennessee, for the first degree murders of Shipley O. Todd and his wife, Cleopatra Todd, on August 10, 1980, in their home in Memphis, Tennessee.[1] The jury sentenced Cone to death for each of the murders, finding unanimously four aggravating circumstances: (1) that Cone was previously convicted of one or more felonies, other than the present charge, involving the use or threat

[1] In the same trial, Cone was also convicted of three charges of assault with intent to commit first degree murder on three other persons and of robbery by use of a deadly weapon upon a fourth. (App. 70)

of violence to the person; (2) that Cone knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder; (3) that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (4) that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another. Tenn. Code Ann. §§39-2-203(i)(2), (3), (5), and (6) (1975 & Supp. 1980) (repealed). The Tennessee Supreme Court affirmed the convictions and sentences, *State v. Cone*, 665 S.W.2d 87 (Tenn. 1984) (App. 70),[2] and this Court denied certiorari. *Cone v. Tennessee*, 467 U.S. 1210 (1984).

Cone subsequently filed a petition for post-conviction relief in the Shelby County Criminal Court. The court denied relief following an evidentiary hearing, and the judgment was affirmed by the Tennessee Court of Criminal Appeals on November 4, 1987. (App. 86) The Tennessee Supreme Court denied Cone's application for permission to appeal, and this Court denied certiorari. *Cone v. Tennessee*, 488 U.S. 871 (1988). Cone then filed a second post-conviction petition, raising for the first time a claim that the trial court's jury instructions at the penalty phase of his trial concerning the "heinous, atrocious or cruel" (HAC) aggravating circumstance were unconstitutionally vague. The Tennessee Court of Criminal Appeals declined to

[2] The Tennessee Supreme Court found that the aggravating circumstance under Tenn. Code Ann. §39-2-203(i)(3) (risk of death to two or more persons) was inapplicable to an extended criminal episode such as the one orchestrated by Cone. But because the jury clearly found three other aggravators, the Court found that any error with respect to the (i)(3) circumstance was harmless beyond a reasonable doubt. *Cone*, 665 S.W.2d 87. (App. 83-84)

address the merits of any of Cone's claims, affirming the trial court's determination that "all of the issues raised by the appellant's amended second petition were either previously determined or waived." *Cone v. State*, 927 S.W.2d 579, 580 (Tenn. Crim. App.), *cert. denied*, 519 U.S. 934 (1996). (App. 98) The state court concluded that Cone "failed to rebut the presumption of waiver as to all claims raised in his second petition for post-conviction relief which had not been previously determined." *Cone*, 927 S.W.2d at 582. (App. 103)

On July 1, 1997, Cone filed a petition for writ of habeas corpus in the United States District Court for the Western District of Tennessee. On May 15, 1998, the district court entered an order of partial dismissal of Cone's claims and later dismissed the remainder of his claims on January 29, 1999. (App. 43) In its final order of dismissal, the district court found, *inter alia*, that numerous claims in the petition, including Cone's challenge to the trial court's instruction on the "heinous, atrocious, or cruel" (HAC) aggravating circumstance, were barred from consideration due to procedural default. (App. 47)

On March 22, 2001, the United States Court of Appeals for the Sixth Circuit reversed and remanded the case to the district court with instructions to issue a writ of habeas corpus vacating Cone's death sentences due to ineffective assistance of counsel at sentencing. *Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001). This Court granted Warden Bell's petition for writ of certiorari and, on May 28, 2002, reversed the decision of the Sixth Circuit and remanded for further proceedings consistent with its opinion. *Bell v. Cone*, 535 U.S. 685 (2002) ("*Cone I*").

On remand, the Sixth Circuit again reversed the district court with instructions to issue a writ of habeas corpus vacating Cone's death sentences, this time finding that the trial court's instructions to Cone's jury on the "heinous, atrocious or cruel" aggravating circumstance were unconstitutionally vague. (App. 1, 23) The Sixth Circuit denied Warden Ricky Bell's timely petition for rehearing on June 22, 2004. (App. 105)

II. Facts Relevant to the Petition

The proof at Cone's criminal trial and sentencing is summarized in the Tennessee Supreme Court's decision on direct appeal, *State v. Cone*, 655 S.W.2d at 90-92 (App. 71-74), and in the previous decision of this Court in *Cone I*. 535 U.S. at 689-90.

The murders of Shipley and Cleopatra Todd were the climax of a series of criminal episodes that began on August 9, 1980, when Cone robbed a jewelry store at gunpoint in Memphis, Tennessee. The jewelry store manager gave a description of the suspect to the police, and an officer in an unmarked police car spotted Cone driving his vehicle a short time after the robbery. Cone apparently became alarmed and accelerated in an attempt to escape. A high-speed chase ensued through mid-town Memphis and into a residential neighborhood, where Cone abandoned his automobile and proceeded on foot. As he fled from police, Cone shot one of the police officers who attempted to arrest him, shot a citizen who challenged him, pulled a gun on a third person and demanded that the latter give Cone his automobile. When the owner of the automobile fled, Cone snapped his pistol several times, but the ammunition in the weapon had been exhausted.

Cone managed to elude police on August 9th, but appeared at the door of a home in the same neighborhood early the next morning and asked to use the phone. When the elderly resident, Lucille Tuech, refused him admittance, Cone drew his pistol on her. Later that same afternoon, Cone broke into the home of Shipley and Cleopatra Todd, who lived a short distance from Ms. Tuech. Mr. Todd was 93 years of age; his wife was 79. The bodies of both victims were found mutilated and cruelly beaten three days later after authorities were alerted by anxious relatives. Both of the victims had been beaten repeatedly about the head until they died. Cone's fingerprints and hair samples were found in the Todds' home, which had been ransacked, and he was apparently able to steal enough money from their home to fly from Memphis to Florida, where he appeared at the home of an acquaintance on August 12.

Although he admitted killing the Todds and committing the other crimes charged, Cone claimed that he was insane, or lacked the requisite mental capacity to commit the offenses, due to drug abuse and stress arising out of his previous military service in Vietnam. On direct appeal to the Tennessee Supreme Court, Cone presented no claim that the trial court's jury instructions concerning the "heinous, atrocious or cruel" aggravating circumstance were unconstitutionally vague, and the Tennessee Supreme Court did not address the issue in its opinion. (App. 70) Under Tennessee's mandatory appellate review provisions, however, the state court reviewed the sufficiency of the evidence supporting the HAC aggravator, finding abundant evidence to support the jury's decision to apply it in Cone's case:

The evidence abundantly established that both of the elderly victims had been brutally beaten to death by multiple crushing blows to the skulls. Blood was spattered throughout the house, and both victims apparently had attempted to resist, because numerous defensive wounds were found on their persons. The only excuse offered in the entire record for this unspeakably brutal conduct by the accused was that these elderly victims had at some point ceased to "cooperate" with him in his ransacking of their home in his effort to flee from arrest. As previously stated, it was stipulated by counsel for appellant that there was no issue of self-defense even remotely suggested. The deaths of the victims were not instantaneous, and obviously one had to be killed before the other. The terror, fright and horror that these elderly helpless citizens must have endured was certainly something that the jury could have taken into account in finding this aggravating circumstance.

Id., 665 S.W.2d at 94-95 (App. 82-83)

Likewise, this Court itself perceived the "horribly brutal and senseless" nature of Cone's crimes and expressly noted in *Cone I* that the State presented "extensive evidence demonstrating the cruelty of the killings." 535 U.S. at 699.

III. The Opinions Below

1. The district court denied Cone's petition for writ of habeas corpus, finding in pertinent part that Cone had procedurally defaulted those claims raised for the first time in his second petition for post-conviction relief, including his challenge to the trial court's instructions on

the "heinous, atrocious or cruel" (HAC) aggravating circumstance at the penalty phase of Cone's trial. (App. 47) Relying upon this Court's decision in *Wainwright v. Sykes*, 433 U.S. 72 (1977), the district court held that "the finding of the Court of Criminal Appeals that Cone's claims raised only in his second petition for post-conviction relief were previously determined or waived is an adequate and independent ground that bars the consideration of these claims in this court." (App. 46-47)

2. In a two-to-one decision, the Sixth Circuit reversed the district court's procedural default determination as to Cone's vagueness challenge to the HAC aggravator. *Cone v. Bell*, 359 F. 3d 785 (6th Cir. 2004) (App. 1) While acknowledging that the claim was neither presented to the Tennessee Supreme Court nor addressed in that court's opinion on direct appeal, the Sixth Circuit nevertheless ruled that the state court "necessarily reviewed" the claim as part of its mandatory appellate death penalty review.[3] (App. 8-15) The court further determined that the state court's silence constituted an "implicit rejection" of Cone's vagueness "claim" on direct appeal, even though no such claim was actually presented to the state court, thereby triggering an analysis of the issue under 28 U.S.C. §2254(d)(1) (federal habeas review of constitutional claims that have been *adjudicated on the*

[3] Tenn. Code Ann. §39-2-205(c) (1982) (repealed) required the Tennessee Supreme Court, in reviewing a sentence of death for first-degree murder, to determine whether: (a) the sentence was imposed in any arbitrary fashion; (b) the evidence supports the jury's finding of any aggravating circumstance(s); (c) the evidence supports the jury's finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance(s); and (d) the sentence of death is excessive or disproportionate. (App. 107)

merits in state court) (emphasis added). (App. 16) Finally, as to the merits, the Sixth Circuit held that the state court's "implicit decision" in Cone's 1984 direct appeal, rejecting his unpresented "challenge" to the HAC aggravating circumstance, was "contrary to" this Court's precedent as announced in *Maynard v. Cartwright*, 486 U.S. 356 (1988), and *Shell v. Mississippi*, 498 U.S. 1 (1990). (App. 23) The *Maynard* and *Shell* decisions were decided by this Court several years *after* Cone's direct appeal to the Tennessee Supreme Court was concluded.

In a dissenting opinion, Judge Norris observed that the "majority's construction of Tennessee law with respect to 'implicit review' as it applies to waiver lacks any clear support from the Tennessee courts" and that "virtually every other circuit" presented with the issue in analogous situations had expressed "concerns" about the "implicit review" rule advanced by the majority. *Cone*, 359 F.3d at 806. (App. 40-41)

REASONS FOR GRANTING THE WRIT

I. BY DEPRIVING THE STATE COURTS OF A FAIR OPPORTUNITY TO PASS UPON AND CORRECT THE ISSUE UPON WHICH HABEAS RELIEF WAS GRANTED, THE DECISION OF THE SIXTH CIRCUIT IS CONTRARY TO THIS COURT'S DECISIONS IN *BALDWIN V. REESE* AND *DUNCAN V. HENRY*.

A habeas petitioner is required to exhaust state remedies by presenting the substance of his claim to the state courts prior to seeking federal habeas relief. 28 U.S.C. §2254(b). Recognizing that principles of federal-state comity must restrain unnecessary "[f]ederal intrusions into state

criminal trials," *Engle v. Isaac*, 456 U.S. 107, 128 (1982), this Court has held that the exhaustion requirement must be "rigorously enforced." *Rose v. Lundy*, 455 U.S. 509, 518 (1982). The exhaustion requirement is satisfied only when the highest state court has been "given a full and fair opportunity to rule on the claim." *O'Sullivan v. Boerckel*, 526 U.S. 838, 846-47 (1999). "Just as the State must afford the petitioner a full and fair hearing on his federal claim, so too must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992) ("Exhaustion means more than notice" and was intended to be "serious and meaningful"). To ensure that the State has the necessary "opportunity" to correct alleged violations of its prisoners' federal rights, a habeas petitioner must "fairly present" his claims to the appropriate state courts for consideration before seeking federal relief. *Duncan v. Henry*, 513 U.S. 365, 365 (1995). Just last term, in *Baldwin v. Reese*, 124 S.Ct. 1347 (2004), the Court emphasized the importance of the federal-state comity concerns underlying the exhaustion requirement by requiring that a state prisoner's presentation of a federal claim to a state court be explicit.

In *Baldwin*, the habeas petitioner had been convicted of kidnapping and sexual offenses in Oregon state court. In state collateral proceedings, petitioner complained that he received ineffective assistance of trial and appellate counsel. After the lower courts denied relief, petitioner filed a petition for discretionary review with the Oregon Supreme Court. Although the petition specified that *trial* counsel's conduct violated several provisions of the Federal Constitution, it contained no such specification as to his separate *appellate* ineffective assistance

claim. The Oregon Supreme Court denied review. *Baldwin*, 124 S.Ct. at 1349-50.

In federal habeas proceedings, the district court held that petitioner had not "fairly presented" his ineffective assistance of appellate counsel claim because his brief to the state supreme court failed to indicate that he was complaining of a violation of federal law. *Id.*, 1350. The Ninth Circuit reversed, finding that, although the petition did not itself assert the "federal nature" of the claim, the Oregon Supreme Court had the "opportunity to read" the lower court opinion. Had they read that opinion, the Ninth Circuit majority reasoned, the Oregon Supreme Court would have, or should have, realized that petitioner's claims rested upon federal law. *Id.*

This Court reversed, holding that a state prisoner does not "fairly present" a claim to a state court if that court must read beyond the petition or a brief (or other similar document) that does not alert it to the presence of a federal claim in order to find material that does so. *Id.*, at 1351. Citing *Duncan v. Henry*, 513 U.S. 364 (1995) (*per curiam*), the Court reiterated the long-standing requirement that, in order to provide a state with the necessary "opportunity to pass upon and correct" alleged violations of its prisoners' federal rights, a habeas petitioner must "fairly present" his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the existence and nature of a federal claim. *Id.* at 1349; *see also Boerckel*, 526 U.S. at 845.

The Sixth Circuit's decision in this case flouts the "fair presentation" requirement described in *Baldwin* and

Duncan. Cone's vagueness challenge to the HAC aggravating circumstance was not presented to the Tennessee Supreme Court on direct appeal, and there is not the slightest mention in that court's opinion of any such challenge. Nevertheless, the Sixth Circuit held that the state court "implicitly decided" the issue as part of its statutorily-mandated review under Tenn. Code Ann. §39-2-205(c)(1) (1982) (repealed) to determine whether "[t]he sentence of death was imposed in any arbitrary fashion." The court below thus deemed the state court's silence on the topic as an implicit adjudication of the claim on the merits reviewable under §2254(d).

But Tennessee law does not require mandatory review of a trial court's jury instructions associated with statutory aggravating circumstances. Mandatory direct review of aggravating circumstances is confined to the sufficiency of the evidence supporting the jury's findings of a statutory aggravating circumstance or circumstances. Tenn. Code Ann. §39-2-205(c)(2). (App. 106-07) In assessing whether a death sentence "was imposed in any arbitrary fashion" under §39-2-205(c)(1), Tennessee appellate courts generally confine the inquiry to determining whether the sentencing phase proceeded according to the procedure established in the applicable statutory provisions and Rules of Criminal Procedure. *See, e.g., State v. Berry*, No. M2001-02023-CCA-R3-DD, 2003 WL 1855099, at *30 (Tenn. Crim. App. Apr. 10, 2003), *aff'd*, No. M2001-02023-SC-DDT-DD, 2004 WL 1873706 (Tenn. Aug. 23, 2004) ("[Because t]he sentencing phase in this matter proceeded in accord with the procedure established by the applicable statutory provisions and Rules of Criminal Procedure . . . [w]e conclude that the sentence of death . . . was not imposed in an arbitrary fashion"). *See also State v. Carter,*

988 S.W.2d 145 (Tenn. 1999) (death sentence based upon verdict form that failed to comply with requirements of applicable statute deemed to be imposed in an "arbitrary fashion"); *State v. Stephenson*, 878 S.W.2d 530 (Tenn. 1994) (same); Tenn. R. App. P. 13(b) ("Review [by Tennessee appellate courts] generally will extend only to those issues presented for review"). *Compare Jones v. United States*, 527 U.S. 373, 387-89 (1999) (mandatory review under Federal Death Penalty Act for the "influence of passion, prejudice or any other arbitrary factor" in imposition of death sentence does not include instructional errors; Congress did not intend to equate legal error with phrase "arbitrary factor").

The question of "implicit review" necessarily hinges upon the scope of the state court's mandatory review, which is ultimately a question of state law. *Nave v. Delo*, 62 F.3d 1024, 1039 (8th Cir. 1995). And in the absence of any Tennessee authority extending the state court's mandatory review to an assessment of jury instructions given in the capital sentencing proceeding, a federal court may not presume that the state courts considered such issues, particularly when they have never been raised. Indeed, the sole Tennessee case upon which the Sixth Circuit relies to support its "implicit review" theory, *West v. State*, 19 S.W.3d 753 (Tenn. 2000), plainly does not stand for the proposition advanced by the court. To the contrary, *West* actually confirms the Warden's contention that the state courts have never reviewed Cone's vagueness challenge, either expressly or implicitly.

In *West*, the petitioner raised for the first time in state post-conviction proceedings a claim that the evidence adduced at his capital sentencing hearing was not sufficient to support the jury's application of the aggravating

circumstance under Tenn. Code Ann. §39-2-203(i)(6) (murder committed for the purpose of avoiding arrest or prosecution). *West*, 19 S.W.3d at 754. In reviewing the claim on appeal, the Tennessee Supreme Court observed that, "[a]lthough West casts the issue as concerning the evidentiary sufficiency of the (i)(6) aggravating circumstance, we think his grievance involves instead the constitutional issue of whether the aggravating circumstance narrows the class of death eligible offenders" under the Eighth Amendment. *Id.* The state court's analysis of West's claim thus reflected its appreciation of the distinction between a challenge to the sufficiency of the evidence supporting an aggravating circumstance, on the one hand, and a challenge to the constitutionality of the aggravating circumstance, on the other. With that distinction in mind, the state court determined that West's claim had been "previously determined" during the statutorily-required review of the sufficiency of the evidence on direct appeal. But, to the extent West's claim challenged the constitutionality of the aggravating circumstance, the court concluded that the claim had been "waived" through West's failure to present it on direct appeal. *Id.*, at 754, 756. Indeed, the Tennessee Supreme Court made clear that, by failing to raise any constitutional challenge to the (i)(6) aggravator on direct appeal, West had "blocked any consideration of this issue by this Court on post-conviction review," *id.*, at 756, a result entirely consistent with the state appellate court's treatment of Cone's Eighth Amendment claim in his second post-conviction proceeding.

In his dissenting opinion, Judge Norris observed that "the majority's construction of Tennessee law with respect to 'implicit review' as it applies to waiver lacks any clear support from the Tennessee courts." *Cone*, 359 F.3d at 805.

(App. 40) And the Sixth Circuit majority concedes that, "without *West*, there would be no Tennessee authority for attempting" the "implicit review" doctrine applied here. *Cone*, 359 F.3d at 792. (App. 13) But since *West* itself provides no authority for the Sixth Circuit's decision, the latter collapses under its own weight.

The "implicit review" rule adopted by the Sixth Circuit in this case eliminates procedural default in Tennessee capital cases. *Coe v. Bell*, 161 F.3d 320, 336 (6th Cir. 1999). Because most, if not all, legal errors associated with the imposition of a death sentence could arguably result in the "arbitrary" imposition of the sentence, there is simply no principled way to distinguish between vagueness challenges to aggravating circumstances and other constitutional claims related to imposition of a death sentence. (App. 14-15) *See, e.g., Ring v. Arizona*, 536 U.S. 584, 605-06 (2002) (jury determination of aggravating circumstances protects against *arbitrary* imposition of death penalty) (emphasis added); *Buchanan v. Angelone*, 522 U.S. 269, 275-77 (1998) (petitioner argued absence of jury instruction on concept of mitigation rendered death sentence *arbitrary*) (emphasis added); *Romano v. California*, 512 U.S. 1, 8 (1994) (in ensuring the death penalty is not meted out *arbitrarily* or capriciously, Court's principal concern has been with the *procedure* by which the State imposes the death sentence) (emphasis added). The uncertainty created by the Sixth Circuit's decision wholly undermines principles of federal-state comity and the finality of state-court judgments that the procedural default doctrine is designed to protect. The Sixth Circuit's decision thus directly conflicts with authoritative decisions of this Court, and certiorari is warranted under Supreme Court Rule 10(c).

II. THE SIXTH CIRCUIT'S ADOPTION OF THE "IMPLICIT REVIEW" DOCTRINE TO ELIMINATE CONE'S STATE-COURT PROCEDURAL DEFAULT AND REACH THE MERITS OF HIS CHALLENGE TO THE "HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE CONFLICTS WITH THE HOLDINGS OF FOUR OTHER CIRCUITS.

Other circuits have refused to find "implicit review" by state courts when a petitioner has failed to "fairly present" a constitutional claim to the state courts for consideration in the first instance. The Fourth Circuit explained its rejection of a similar argument directed at South Carolina's practice of plenary review of the record on direct appeal as follows:

> Even with *in favorem vitae* review, unless the prisoner raises the specific objections before the state court, we cannot determine whether the state court has properly applied federal constitutional principles, or for that matter, whether the state court has even considered these issues at all. In short we have no state court judgment to review. As the court explained in *Engle*, "[t]he state appellate courts [must have] a chance to mend their own fences and avoid federal intrusion." *Engle v. Isaac*, 456 U.S. 107, 128-29, 102 S.Ct. 1558, 1572, 71 L.Ed.2d 783 (1982).

Kornahrens v. Evatt, 66 F.3d 1350, 1362 (4th Cir. 1995), *cert. denied*, 517 U.S. 1171 (1996). The Fourth Circuit reasoned that, absent some assurance that the state court had an opportunity to confront the federal constitutional issue on the merits, federal habeas review "would not be a 'review' of the state court judgment, but rather would be

another avenue of direct appeal." *Kornahrens*, 66 F.3d at 1363.

Likewise, in *Julius v. Johnson*, 840 F.2d 1533, 1546 (11th Cir. 1988), the Eleventh Circuit rejected a habeas petitioner's invitation to excuse his failure to raise claims on direct appeal on the theory that the Alabama appellate courts implicitly reviewed the claims that he failed to raise explicitly. The Eleventh Circuit ruled that "the assertion by an Alabama court that it did not find any errors upon its independent review of the record does not constitute a ruling on the merits of claims not raised in that court or in any court below. *Unless there is some indication that the state court was aware of this issue, we cannot say that the court rejected the merits of petitioner's constitutional claim." Id.* at 1546 (emphasis added). Adoption of a contrary rule, the appellate court observed, would "encourage the 'sandbagging' of state courts criticized in *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 397 (1986)." *Julius*, 840 F.2d at 1546. *See also Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1306 (9th Cir. 1996) (state court's "review for fundamental error on direct appeal" does not prevent procedural preclusion from attaching).

Other circuits have reached the same conclusion even in the face of mandatory statutory review provisions similar to Tennessee's. The Fourth Circuit, for example, declined to excuse a habeas petitioner's procedural default under Virginia's mandatory statutory review, concluding in *Mu'min v. Pruett*, 125 F.3d 192 (4th Cir. 1997), that the Virginia statute requiring review of death sentences for "passion, prejudice or any other arbitrary factor" does not require the court to "examine the record for constitutional errors not specified on appeal." *Mu'min*, 125 F.3d at 197. *But see Beam v. Paskett*, 3 F.3d 1301, 1307 (9th Cir. 1993)

(Idaho Supreme Court deemed to have implicitly reviewed application of "continuing threat" aggravator to petitioner under the state court's mandatory review of the death sentence for "passion, prejudice or other arbitrary factor").

In *Nave v. Delo*, 62 F.3d 1024, 1039 (8th Cir. 1995), *cert. denied*, 517 U.S. 1214 (1996), the habeas petitioner argued that Missouri's statute requiring review of capital cases excused his procedural default of a constitutional challenge to jury instructions on mitigating circumstances at his capital sentencing proceeding. The Eighth Circuit concluded, however, that the state's mandatory review of death sentences for "passion, prejudice or any other arbitrary factor" does not require that the state appellate court "review death penalty cases *sua sponte* for constitutional or instructional errors that are not specified in the direct appeal." *Nave*, 62 F.3d at 1039. Because the petitioner's claim of instructional error was "outside the limited bases of mandatory review," it may not be deemed to have been submitted to the state court in the first instance and is, thus, barred from federal habeas review by procedural default. *Id. See also Oxford v. Delo*, 59 F.3d 741, 746 (8th Cir. 1995) (statutorily mandated review of all death sentences did not require Missouri Supreme Court "to demonstrate such clairvoyance nor to scour the record in search of errors that the defendant has failed to raise in his appeal").

The decision by the Sixth Circuit in this case squarely conflicts with decisions from the Fourth, Eighth, Ninth, and Eleventh Circuits. Review by this Court is thus also warranted under Supreme Court Rule 10(a).

III. THE SIXTH CIRCUIT'S DECISION GRANTING HABEAS CORPUS RELIEF ON CONE'S EIGHTH AMENDMENT VAGUENESS CHALLENGE TO THE "HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE, DESPITE THE TENNESSEE SUPREME COURT'S PRIOR ADOPTION OF A CONSTITUTIONALLY PERMISSIBLE NARROWING CONSTRUCTION EXPRESSLY APPROVED BY THIS COURT, EXCEEDS ITS AUTHORITY UNDER 28 U.S.C. §2254(d) AND IS CONTRARY TO THIS COURT'S DECISIONS IN *PROFFITT V. FLORIDA* AND *GODFREY V. GEORGIA*.

In imposing death sentences for both of Cone's murder convictions, the jury found that four aggravating circumstances had been established by the proof at the sentencing hearing, including that each murder was "especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." Tenn. Code Ann. §§39-2-203(i)(5) (1975 & Supp. 1980) (repealed). Prior to deliberation, the jury was instructed in both the plain language of the statute and a limiting instruction defining the specific terms of the aggravating circumstance:

> "Heinous" means extremely wicked or shockingly evil.
>
> "Atrocious" means outrageously wicked and vile.
>
> "Cruel" means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless.

(App. 111)

Cone did not raise a vagueness challenge to the jury instructions defining the HAC aggravator either in the trial court or on direct appeal, and the Tennessee Supreme Court did not address the issue in its opinion affirming his death sentences. The court found, however, that the record contained abundant evidence to support the jury's decision to apply the HAC aggravator in Cone's case. *Cone*, 665 S.W.2d at 94-95. (App. 82-83) *See also Cone I*, 535 U.S. at 699 (noting the presence of "extensive evidence demonstrating the cruelty of the killings").

Under the guise of applying the standard of review mandated by 28 U.S.C. §2254(d), the Sixth Circuit held that the Tennessee Supreme Court's "implicit rejection" in 1984 of Cone's vagueness "challenge" to the HAC aggravator was an "adjudication on the merits" contrary to clearly established federal law as of the time of the state court judgment. In so ruling, the court discounted the Tennessee Supreme Court's previous adoption of a constitutionally permissible narrowing construction of the aggravating circumstance, focusing instead solely upon the bare terms set forth by the statute, specifically, that "the murders were especially heinous, atrocious or cruel in that [they] involved torture or depravity of mind." (App. 19-20, 22) Three years before its decision on direct appeal in Cone's case, however, the Tennessee Supreme Court, in *State v. Dicks*, 615 S.W.2d 126 (Tenn. 1981), adopted, verbatim, the very construction of Tennessee's HAC aggravator that had been approved by this Court in *Proffitt v. Florida*, 428 U.S. 242 (1976), in connection with Florida's HAC aggravator. In *Dicks*, the Tennessee Supreme Court held that Tennessee's HAC aggravating circumstance is directed at "the conscienceless or pitiless crime which is unnecessarily torturous to

the victim." *Dicks*, 615 S.W.2d at 132. Reviewing Florida's "especially heinous, atrocious or cruel" aggravator under an identical construction, this Court concluded: "We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." *Proffitt*, 428 U.S. at 256. Ironically, the sole basis offered by the Sixth Circuit for ignoring the state court's narrowing construction of Tennessee's HAC aggravator was that the Tennessee Supreme Court failed to cite the *Dicks* decision in its opinion on direct appeal when it supposedly rejected Cone's unpresented Eighth Amendment challenge to the aggravator. *Cone*, 359 F.3d at 797. (App. 22-23) The Sixth Circuit's analysis wholly undermines the deference to state-court judgments required under 28 U.S.C. §2254(d) and is irreconcilable with this Court's decisions.

As amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. §2254(d), in pertinent part, prohibits a federal habeas court from granting relief on a claim adjudicated on the merits in state court proceedings unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . . " 28 U.S.C. §2254(d)(1). Simply put, AEDPA removed the authority of a federal court to disturb a state court judgment based upon its independent determination that the state court erred in deciding a constitutional question. Although the Sixth Circuit recited the appropriate standard of review, its actual analysis bears little resemblance to the highly deferential review described by this Court in *Williams v. Taylor*, 529 U.S. 362 (2000).

Repeatedly, this Court has emphasized that critical to the disposition of any Eighth Amendment vagueness challenge to a statutory aggravating circumstance is an examination of the way in which the state appellate courts have construed the aggravator. *See Proffitt v. Florida*, 428 U.S. 242 (1976) (allegedly vague provisions in HAC aggravator "must be considered as they have been construed by the [state supreme court]"). In *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Court held that Georgia's application of its "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance violated the Eighth Amendment. In analyzing the defendant's vagueness claim, the Court observed, first, that the language of the statute, standing alone, failed to provide sufficient guidance or "any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Godfrey*, 446 U.S. at 428. But just as important as the language of the aggravator itself, and indeed dispositive of *Godfrey*, was the fact that the Georgia Supreme Court, in reviewing the death sentence, had failed to cure the defect by adopting a proper limiting construction. *Id.*, 446 U.S. at 429.[4] The Court, in fact, recited the issue in *Godfrey*, not in terms of the statutory language of the aggravating circumstance, but rather, the construction of that circumstance adopted by the Georgia Supreme Court. *Id.*, 446 U.S. at 423 ("The issue now before us is whether, in affirming the imposition

[4] This Court specifically noted that it had previously upheld the identical aggravating circumstance in *Gregg v. Georgia*, 428 U.S. 153 (1976), with one opinion in that case stating: "It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." *Gregg*, 428 U.S. at 201 (Stewart, Powell, and Stevens, JJ.).

of the sentences of death in the present case, the Georgia Supreme Court has adopted such a broad and vague construction of the §(b)(7) aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the United States Constitution").

The Court later applied the same rationale in *Maynard v. Cartwright*, 486 U.S. 356 (1988), holding that Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague as applied in that case. Specifically, the Court noted that, although the Oklahoma Court of Criminal Appeals had since restricted application of the aggravator to murders involving torture or serious physical abuse, it had not done so as of the time of the petitioner's appeal in that case. *Maynard*, 486 U.S. at 365. The Court further made clear that "torture or serious physical abuse" was not the *only* limiting construction of the HAC aggravator that would be constitutionally acceptable. *Id.*, 486 U.S. at 365.[5]

As previously stated, unlike Georgia and Oklahoma, the Tennessee Supreme Court had been applying a constitutionally acceptable construction of the HAC aggravator since its 1981 decision in *Dicks*, in which it adopted the

[5] Because this Court's decision in *Maynard* was issued after the Tennessee Supreme Court's decision on direct appeal in Cone's case, *Maynard* may not be used as a basis for overturning the state court's decision. *See Williams*, 529 U.S. at 412 (statutory phrase "clearly established Federal Law" refers to holdings of this Court's decisions "as of the time of the relevant state-court decision"). However, the Tennessee Supreme Court's narrowing construction and treatment of the HAC aggravator in *Dicks* is wholly consistent with the rationale articulated in *Maynard*. Thus, contrary to the Sixth Circuit's suggestion, rather than undermining the constitutionality of Tennessee's HAC aggravator as applied in Cone's case, *Maynard* in fact supports it.

construction approved by this Court in *Proffitt*. *See also Pritchett v. State*, 621 S.W.2d 127 (Tenn. 1981) (death sentence reversed where evidence failed to support application of HAC under narrowing construction approved in *Godfrey;* defendant "did not inflict torture or serious physical abuse upon the victim before death").[6] It was the narrowing construction adopted in *Dicks*, identical to the one approved in *Proffitt*, that the Tennessee Supreme Court necessarily would have applied in considering any vagueness challenge to the HAC aggravator in 1984 on direct appeal in Cone's case. Moreover, although the state court did not specifically cite *Dicks* in its decision (a fact that is hardly surprising since the issue was never presented to it), it must be presumed that the Tennessee Supreme Court was aware that it had adopted the *Proffitt* definition of the HAC aggravator and that it would have applied that narrowing definition in reviewing petitioner's case. *See, e.g., Walton v. Arizona*, 497 U.S. 639, 653-54 (1990) (judges are presumed to know the law and to apply it in making their decisions).

This Court has made it abundantly clear that an otherwise unconstitutionally vague aggravating circumstance can be cured on appeal by a state appellate court's application of a limiting construction that satisfies the commands of the Eighth Amendment. Because the

[6] The Court in *Pritchett* specifically noted that "a constitutional construction of this aggravating circumstance requires evidence that the defendant inflicted torture on the victim before death or that defendant committed acts evincing a depraved state of mind." *Pritchett*, 621 S.W.2d at 139. The Court concluded that the defendant's actions in *Pritchett* fell short of exhibiting the depravity required in *Godfrey*, *i.e.*, "a consciousness materially more depraved than that of any person guilty of murder." *Id.*

Tennessee Supreme Court had adopted a constitutional narrowing construction that satisfied the mandates explicitly set forth by this Court as of the time of its decision in Cone's case, the state court's hypothetical disposition of Cone's unpresented Eighth Amendment challenge to the HAC aggravator can in no way be viewed as contrary to clearly established federal law under §2254(d). The Sixth Circuit's conclusion to the contrary conflicts with this Court's decisions and wholly undermines the "highly deferential" standard mandated by AEDPA. *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997). Certiorari review is thus warranted under Supreme Court Rule 10(c).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Gary Bradford Cone,
Petitioner-Appellant,

v. No. 99-5279

Ricky Bell, Warden,
Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 97-02312 – Jon Phipps McCalla, District Judge.

Argued: September 10, 2003

Decided and Filed: March 1, 2004

Before: MERRITT, RYAN, and NORRIS, Circuit Judges.

COUNSEL

ARGUED: Paul R. Bottei, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee.

ON BRIEF: Paul R. Bottei, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville, Tennessee, Robert L. Hutton, GLANKLER BROWN, Memphis, Tennessee, for Appellant. Jennifer L. Smith, Tonya G. Miner, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee.

RYAN, J., delivered the opinion of the court. MERRITT, J. (pp. 25-36), delivered a separate concurring

opinion. NORRIS, J. (pp. 37-38), delivered a separate dissenting opinion.

OPINION

RYAN, Circuit Judge. Gary Bradford Cone was sentenced to death in a Tennessee state court for a double murder of an elderly couple and his conviction and death sentence were affirmed by the Tennessee Supreme Court.

On this appeal from the district court's denial of Cone's petition for *habeas corpus* relief, we are asked to decide

- Whether Cone was sentenced to death in violation of the prohibition against cruel or unusual punishment of the Eighth Amendment of the United States Constitution.

Before we may reach that question, however, we must resolve two rather complex and interrelated questions of state procedural law.

- The first, is whether, under Tennessee law, the state supreme court implicitly reviews death penalty sentences for arbitrariness, even in cases in which the issue is not raised explicitly.

- The second, is whether the petitioner procedurally defaulted, in the state court, the Eighth Amendment issue he asks us to decide.

Our answer to the first state law question is yes, and to the second, it is no. Given our resolution of these issues, we are authorized to reach the Eighth Amendment issue,

for which the petitioner has brought this appeal. As to that issue, we hold that petitioner Cone's death sentence must be vacated because one of the statutory aggravating circumstances the jury relied upon in imposing the death sentence – that the murders were "especially heinous, atrocious, or cruel" – is unconstitutionally vague, and therefore, violates the Eighth Amendment.

I.

Cone was sentenced to death in a Tennessee court in 1982 following his conviction for the brutal murders of an elderly couple, Shipley and Cleopatra Todd. The facts of the case are fully detailed in our previous decision in *Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001), *rev'd*, 535 U.S. 685 (2002), and need not be recounted here. It is necessary, however, to detail the procedural history of the case in order to explain why we have the case on appeal for a second time and to explain the basis for the State's argument that Cone has procedurally defaulted the Eighth Amendment issue he now asks us to decide.

Cone challenged his conviction and sentence on direct review in the Tennessee Supreme Court, which conducted a mandatory death penalty review pursuant to Tenn. Code Ann. § 39-2-205 (1982) (current version at Tenn. Code Ann. § 39-13-206 (2003)). *State v. Cone*, 665 S.W.2d 87 (Tenn. 1984). The Tennessee court affirmed Cone's murder convictions, and then, as it was required to do, considered the validity of the aggravating circumstances relied on by the jury in imposing the death penalty. *Id.* at 94-96. Under Tennessee law as it existed at the time of Cone's conviction, a jury could impose the death penalty only if it found that the prosecution had proved, beyond a reasonable

doubt, the existence of at least one of twelve aggravating factors. Tenn. Code Ann. § 39-2404(i) (1981) (current version at Tenn. Code Ann. § 39-13-204(i) (2003)). In Cone's case the jury found four aggravating factors, which were defined in the statute as follows:

> (2) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.
>
> (3) The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.
>
> . . . .
>
> (5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.
>
> (6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.

Tenn. Code Ann. § 39-2404(i) (1981). In its review of the jury's findings, the Tennessee Supreme Court first noted that the jury had failed to find one aggravating factor, that the crime was committed in the course of committing another felony (felony-murder), even though the evidence clearly would have supported it. *State v. Cone,* 665 S.W.2d at 94.

The court then reviewed the four aggravators the jury did find, and concluded (1) that the evidence supported the finding that Cone had been convicted previously of one or more felonies involving violence, *id.;* (2) that the evidence

supported the finding that the murders were "especially heinous, atrocious, or cruel in that they involved torture or depravity of mind," *id.* at 94-95; (3) that the evidence supported the finding that the murders were committed for the purpose of preventing a lawful arrest or prosecution, *id.* at 95; and (4) that the evidence was *insufficient* to support the jury's affirmative finding that the petitioner "'knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during [the] act of murder,'" *id.* (citation omitted). But the court found this error to be "harmless beyond a reasonable doubt" in light of the three other aggravating circumstances found by the jury and the court's conclusion that the jurors should have found, although they did not, the additional aggravator, that the petitioner was guilty of felony-murder. *Id.* Accordingly, the court affirmed Cone's death sentence. The constitutionality of the jury's finding that the murders were "especially heinous, atrocious, or cruel," which we hereafter refer to as the "HAC" aggravator, is a fundamental issue in this case.

Cone filed his first state post-conviction petition in the state trial court on June 22, 1984, attacking his conviction and death sentence. He alleged numerous violations of his rights under the United States Constitution including prosecutorial misconduct and the ineffective assistance of counsel at trial. The trial court held a hearing and denied Cone's petition. The Tennessee Court of Criminal Appeals affirmed the denial and the Tennessee Supreme Court declined Cone's request to appeal.

Approximately five years later, in June 1989, Cone filed a second state post-conviction petition, followed by several amendments. In this second petition, Cone alleged numerous constitutional violations including, for the first

time, an Eighth Amendment claim that the language of the HAC aggravator considered by the jury in the sentencing phase was unconstitutionally vague. The trial court dismissed the second petition as barred by the successive petition restrictions of Tennessee's post-conviction statute, Tenn. Code Ann. § 40-30-111 (1990) (since repealed), holding that all the grounds raised in the second petition were barred because they either had been previously determined or were waived. This judgment was affirmed by the Tennessee Court of Criminal Appeals, and the Tennessee Supreme Court denied an application for permission to appeal. The United States Supreme Court denied Cone's petition for a writ of *certiorari*.

Cone then filed a motion in federal district court to stay his execution. The district court granted the stay and Cone filed a petition for a writ of *habeas corpus* under 28 U.S.C. § 2254. The district court denied the § 2254 petition and lifted the stay of execution. We then granted Cone's motion for a certificate of appealability.

After briefing and oral argument, we granted Cone's *habeas* petition with respect to his death sentence because we thought he had been unconstitutionally denied the effective assistance of counsel at sentencing. We found it unnecessary to decide several of Cone's other sentencing claims, including his "Eighth Amendment cruel and unusual punishment argument and his argument concerning the application of aggravating circumstances." *Cone,* 243 F.3d at 975. In *Bell v. Cone,* 535 U.S. 685 (2002), the U.S. Supreme Court reversed our decision on the ineffective assistance of counsel issue and remanded to this court for further proceedings, which we understand to mean consideration of the sentencing issues that Cone raised and we did not reach in our previous decision.

II.

"An appellate court reviews a district court's decision to deny or grant a writ of habeas corpus *de novo,* but it reviews the district court's factual findings only for clear error." *Barker v. Yukins,* 199 F.3d 867, 870 (6th Cir. 1999).

III.

Initially, we must take up the State's argument that Cone's Eighth Amendment claim that the HAC aggravating factor was unconstitutionally vague, first raised in his second petition for post-conviction relief, had been procedurally defaulted. We address this issue first because, as a general rule, on *habeas* review, federal courts may not consider procedurally defaulted claims. *Seymour v. Walker,* 224 F.3d 542, 549-50 (6th Cir. 2000). A claim is procedurally defaulted if: (1) the petitioner failed to comply with an applicable state procedural rule; (2) the state courts actually enforced the procedural rule; and (3) the state courts' finding of noncompliance is an adequate and independent state ground for denying relief on the federal constitutional claim. *Maupin v. Smith,* 785 F.2d 135, 138 (6th Cir. 1986).

Under Tennessee law at the time of Cone's conviction, grounds for relief that had been previously determined or waived were not cognizable in a state post-conviction action. Tenn. Code Ann. § 40-30-111 (since repealed). In its consideration on appeal of the denial of Cone's second post-conviction petition, the Tennessee Court of Criminal Appeals refused to address Cone's constitutional challenge to the HAC aggravator because, according to the court, it had been either previously determined or waived. *Cone v. State,* 927 S.W.2d 579, 582 (Tenn. Crim. App. 1995). Of

these two possibilities, "previously determined" or "waived," we must determine which one actually describes the status of Cone's constitutional claim in the state courts. If Cone waived his claim, then such waiver will constitute a procedural default and will serve as an adequate and independent state ground barring *habeas* review in this court. If Cone's claim was previously determined, then we must decide whether the state courts' determination "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (West Supp. 2003).

Cone argues that he did not procedurally default on his Eighth Amendment vagueness challenge to the HAC aggravating factor, because the Tennessee Supreme Court "necessarily reviewed" the claim as part of its mandatory death penalty review.

In death penalty cases the Tennessee Supreme Court is required to conduct a mandatory death penalty review to determine whether:

> (1) The sentence of death was imposed in *any arbitrary* fashion;
>
> (2) The evidence supports the jury's findings of a statutory aggravating circumstance or statutory aggravating circumstances;
>
> (3) The evidence supports the jury's finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance or circumstances so found; and
>
> (4) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.

Tenn. Code Ann. § 39-2-205(c) (1982) (emphasis added) (current version at Tenn. Code. Ann. § 39-13-206(c)(1) (2003)).

Tennessee responds that Cone's "necessarily reviewed" claim, also known as "implicit review," proves too much, since it would eviscerate the procedural default doctrine with respect to all constitutional claims.

The U.S. Courts of Appeals are divided on whether these state mandatory review statutes create an implicit review of constitutional challenges not explicitly raised. The Fourth, Eighth, and Eleventh Circuits all have rejected the implicit review argument. *See Mu'min v. Pruett,* 125 F.3d 192, 197 (4th Cir. 1997); *Nave v. Delo,* 62 F.3d 1024, 1039 (8th Cir. 1995); *Julius v. Johnson,* 840 F.2d 1533, 1546 (11th Cir. 1988). The Ninth Circuit reached the opposite conclusion in an Idaho death penalty case, albeit in *dicta. See Beam v. Paskett,* 3 F.3d 1301, 1306 (9th Cir. 1993), *overruled on other grounds by Lambright v. Stewart,* 191 F.3d 1181 (9th Cir. 1999).

This court, in *Coe v. Bell,* 161 F.3d 320 (6th Cir. 1998), in *dicta,* expressed discomfort with the implicit review argument in the context of a challenge to jury instructions on unanimity in sentencing in a death penalty case in a Tennessee court. *Id.* at 336. We stated that the argument that "the [Tennessee] supreme court has to review significant errors, whether or not they were raised by the defendant," is "too broad, as it would eliminate the entire doctrine of procedural bar in Tennessee in capital cases." *Id.* Despite these reservations, we recognized in *Coe* that Tennessee courts had been moderately receptive to the

implicit review theory. *Id.* For example, in *State v. Martin,* 702 S.W.2d 560 (Tenn. 1985), *overruled on other grounds by State v. Brown,* 836 S.W.2d 530 (1992), the Tennessee Supreme Court stated that it was "required by statute to review the sentence and to consider significant errors whether or not called to the attention of the *trial court.*" *Id.* at 564 (emphasis added). We explained in *Coe* that, based on *Martin,* a procedural default could not arise under Tennessee law when a capital defendant raised an issue on appeal which he had failed to preserve properly during trial. *Coe,* 161 F.3d at 336. Thus, in *Coe,* we partially adopted the implicit review theory, but only to the extent of issues that were explicitly raised on appeal, even though not properly preserved in the trial court. Of course, unlike *Coe,* Cone's unconstitutional HAC aggravator issue was not explicitly raised either in the trial court or on direct review in the Tennessee Supreme Court.

The cases that divide the circuits on the implicit review theory agree on one point: "The scope of the state court's mandatory review is, ultimately, a question of state law." *Nave,* 62 F.3d at 1039. Accordingly, *if* Tennessee construes its mandatory review statute to encompass constitutional issues not explicitly raised on direct review, then the Tennessee Supreme Court must be deemed to have considered the constitutionality of the HAC aggravator in this case, and Cone did not procedurally default on the claim.

It is important to frame this preliminary question of state law carefully. We understand the question to be whether it is the law in Tennessee that in all capital punishment cases, the Tennessee Supreme Court reviews the sentencing proceedings to ensure that the jurors have not imposed the death penalty "in any arbitrary fashion,"

Tenn. Code Ann. § 39-2-205(c) (1982), even in cases in which the issue is not raised on direct review.

Just three years ago, in *State v. West,* 19 S.W.3d 753 (Tenn. 2000), the Tennessee Supreme Court considered whether a defendant could raise an issue in his state post-conviction petition that he had not raised on direct review. *Id.* at 754. The court prefaced its discussion as follows:

> In this appeal of a post-conviction proceeding, . . . the appellant[] raises for the first time the issue whether evidence adduced at the sentencing phase of his trial was sufficient to support the jury's conclusion that he committed two murders for the purpose of avoiding arrest or prosecution. *Although [the appellant] casts the issue as concerning the evidentiary sufficiency of the (i)(6) aggravating circumstance, we think his grievance involves instead the constitutional issue of whether the aggravating circumstance narrows the class of death eligible offenders. He says that it does not, and because it does not, he contends that it violates the Eighth Amendment.*

Id. (emphasis added). The court's reference to "narrow[ing] the class of death eligible offenders" is responsive to the rule announced in *Zant v. Stephens,* 462 U.S. 862 (1983), that in capital punishment cases, the "aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty" in order to ensure that the jury's discretion in imposing the death sentence is "adequately . . . channel[ed]." *Id.* at 877. Later Supreme Court cases have characterized death sentences imposed without appropriately narrowing instructions as having been imposed *arbitrarily* and upon criteria, *i.e.,* statutory aggravating factors, whose language is unconstitutionally vague. *See, e.g., Tuilaepa v. California,* 512 U.S. 967, 974-75

(1994); *Sawyer v. Whitley,* 505 U.S. 333, 367 (1992) (Stevens, J., concurring).

The emphasized language in *West* is significant because the court characterized the issue as an Eighth Amendment vagueness challenge to a statutory aggravating factor, the precise issue raised by Cone. In *West*, the State argued that the defendant could not raise the vagueness issue in his post-conviction petition for two reasons: (1) he had failed to raise it on direct appeal and thus "waived" it; and, *alternatively,* (2) it had been "previously determined" due to the Tennessee Supreme Court's mandatory review. *West,* 19 S.W.3d at 756. The court agreed with the State, but, in a seeming contradiction, held that the vagueness issue had been *both* "previously determined" *and* "waived" as a result of West's direct appeal. *Id.* Specifically, the court stated:

> Under Tenn. Code Ann. § 40-30-112(b), when [the appellant] failed to raise the (i)(6) issue on direct appeal, he effectively blocked any consideration of this issue by this Court on post-conviction review. Additionally, under Tenn. Code Ann. § 39-2-205(c)(3) (1982) (repealed 1989), this Court was required in *all* cases in which the death penalty was imposed to *automatically* consider whether the "evidence supports the jury's finding of a statutory aggravating circumstance or statutory aggravating circumstances. . . ." Pursuant to these mandatory provisions, this Court found that the requirements of the statute had, in fact, been met in [the appellant's] case. Thus, we conclude that the issue under discussion has, indeed, been both "previously determined" and "waived," under the definitions provided in Tenn. Code Ann. § 40-30-112(a) and (b).

Id. (emphasis added) (internal citations omitted).

Although *West* appears to stand alone as direct support for the implicit review argument, other Tennessee Supreme Court cases lend moderate support. In *Martin,* discussed above, the court held that it was "required by statute to review the sentence and to consider significant errors whether or not called to the attention of the *trial court.*" 702 S.W.2d at 564 (emphasis added). Likewise, in *State v. Duncan,* 698 S.W.2d 63 (Tenn. 1985), the court stated: "in cases where the defendant is under sentence of death, this court is under the duty to 'automatically' review the sentence, which imposes the burden on this court to consider any *alleged* error, whether called to the *trial court's* attention or not." *Id.* at 67-68 (emphasis added). Finally, in *State v. Nesbit,* 978 S.W.2d 872 (Tenn. 1998), the court held that the mandatory review statute gave it jurisdiction to review issues raised by the defendant's appeal despite the defendant's failure to timely file his appeal. *Id.* at 880-81. These three cases make clear that the Tennessee Supreme Court considers its task when conducting the required review to be important enough to warrant departures from procedural rules that would normally bar supreme court review. In each of these three cases, however, unlike this case, the issue was raised by the defendant on direct review.

The conceptual leap from claims explicitly raised on direct appeal, although not properly preserved, to claims not raised at all is significant and, without *West*, there would be no Tennessee authority for attempting it. Nevertheless, *West* cannot be ignored; neither can the Tennessee statute, which mandates supreme court review to assure that no death sentence is "imposed in any arbitrary fashion." Tenn. Code Ann. § 39-2-205(c)(1) (1982). It is also

significant that the statute does not condition the mandatory review upon the issues named in the statute being properly raised. The following factors in *West* strongly favor the conclusion that it is the law in Tennessee that the supreme court "implicitly" reviews death sentences for arbitrariness, even if the issue is not explicitly raised on direct appeal: (1) the language that in "all" death penalty cases, the court "automatically" complies with the mandatory review statute; (2) the court's re-characterization of the appellant's "evidentiary sufficiency" challenge as a vagueness (*i.e.,* arbitrariness) challenge; and (3) its holding that the same was "previously determined" (although never raised by the appellant). We can find no other logical construction to put upon the court's language in *West*.

We note, in passing, that the implicit review doctrine, as we apply it today in this case, does not foreclose the possibility that other death penalty defendants may procedurally default on other constitutional issues not raised on direct appeal. The language of Tennessee's mandatory review statute provides a basis to distinguish between vagueness challenges and other constitutional claims, since it requires the Tennessee Supreme Court to look specifically for sentences "imposed in any arbitrary fashion." The "evil" of vague sentencing instructions is, precisely, that they invite arbitrary decision-making. As the U.S. Supreme Court has stated: "our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright,* 486 U.S. 356, 362 (1988). Because there are other constitutional violations that do not pose this same risk, the implicit review principle we

have applied today would not necessarily save those claims from procedural default.

We think that given the holding in *West*, and the court's language explaining it, we must conclude that the Tennessee Supreme Court implicitly considered and rejected Cone's unmentioned vagueness "challenge" to the HAC aggravator, in the course of its mandatory review. As such, Cone's claim must be deemed to have been decided on the merits during the direct appeal and, therefore, when the Tennessee lower courts disposed of the claim on procedural grounds they did so not because the claim was "waived" but because it was "previously determined."

This conclusion would seem to be confirmed by the written findings of the state trial court dismissing Cone's second amended petition for post-conviction review. Referring to the specific paragraph of the petition in which Cone raised his vagueness challenge for the first time, the trial court stated: "grounds . . . [appearing in paragraph] 18 . . . involve[] a potpourri of various errors by the court at the trial all of which grounds *have been considered and denied* in direct appeal or the First Post Conviction Petition." *Cone v. State,* No. P-06874, slip op. at 4 (Crim. Ct. Tenn., 13th Judicial Dist., Dec. 16, 1993) (emphasis added). The Tennessee Court of Criminal Appeals, the last state court to render an opinion on Cone's petition, affirmed the holding of the trial court and, in fact, commended the trial court judge for his "exemplary and meticulous treatment of the appellant's petition." *Cone v. State,* 927 S.W.2d at 581. These statements by the lower state courts are in accordance with our holding today: that, under Tennessee law, Cone's vagueness challenge was not "waived," but "previously determined."

Therefore, although Cone failed to explicitly raise the vagueness challenge to the HAC aggravator, that claim was nonetheless implicitly decided on the merits by the Tennessee Supreme Court and it is a proper subject for federal *habeas* review.

IV.

Finally, we turn to the merits of Cone's *habeas* claim that the HAC aggravator the jury considered in sentencing him to death is unconstitutionally vague, thus invalidating his sentence.

A.

Our standard of review is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). When a petitioner's claim has been adjudicated on the merits in a state court, a federal court may not grant a writ of *habeas corpus* with respect to such claim, unless the state court's determination:

> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (West Supp. 2003). A state court's decision must be evaluated against the clearly established Supreme Court precedent at the time the petitioner's

conviction became final. *Williams v. Taylor,* 529 U.S. 362, 380 (2000). Moreover, as we explained recently:

> A state court decision is "contrary to" Supreme Court precedent "if the state court arrives at a conclusion opposite to that reached by [the Court] on a question of law," or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to" the Court's decision. A state court decision involves an "unreasonable application" of clearly established Supreme Court precedent when it correctly identifies the governing legal standard but applies it to the facts of the case before it in an objectively unreasonable manner.

Alley v. Bell, 307 F.3d 380, 385 (6th Cir. 2002) (internal citation omitted) (quoting *Williams,* 529 U.S. at 405, 409-10), *cert. denied,* 124 S.Ct. 99 (2003)

B.

At sentencing, the jurors were instructed that they could not impose the death penalty unless they unanimously found, beyond a reasonable doubt, at least one of eleven statutory aggravating factors, including whether "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." In a limiting instruction, the court then defined some of the terms of this aggravating factor:

> "Heinous" means extremely wicked or shockingly evil.
>
> "Atrocious" means outrageously wicked and vile.

> "Cruel" means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless.

The jurors found that Cone's crime was "especially heinous, atrocious, or cruel." They did not add, on their verdict form, the words, "in that it involved torture or depravity of mind." However, we do not think that omitting that verbiage when announcing the verdict is of any constitutional significance.

Cone argues that the HAC aggravator is "clearly unconstitutional" based upon the holding of *Godfrey v. Georgia,* 446 U.S. 420 (1980). *Godfrey* held that the Georgia statutory aggravator, "that the offense 'was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim,'" *id.* at 422 (citation omitted), was unconstitutionally vague, because there was "nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence," *id.* at 428.

The State responds first, that the language of the Tennessee HAC aggravator, as further defined and limited by the trial court, is not the language found to be vague in *Godfrey,* and second, that the HAC aggravator in Cone's case was not "contrary to . . . clearly established" U.S. Supreme Court precedent as it stood at the time of Cone's direct appeal. That precedent, the State argues, was established in *Proffitt v. Florida,* 428 U.S. 242 (1976), decided eight years before Cone's conviction became final, in which the Court held that Florida's HAC aggravator was not unconstitutionally vague in light of the Florida courts' narrowing construction that the term "heinous, atrocious, or cruel" means a "'conscienceless or pitiless

crime which is unnecessarily torturous to the victim.'" *Id.* at 255-56 (citations omitted). This narrowing language is the identical language the Tennessee Supreme Court used in narrowing Tennessee's HAC aggravator in *State v. Dicks,* 615 S.W.2d 126, 132 (Tenn. 1981), a case decided three years before the court's "implicit review" of Cone's case. Moreover, the State argues, it must be presumed that the Tennessee Supreme Court evaluated the Cone jury's reliance upon the HAC aggravator using the same narrowing construction adopted in *Dicks.* The State also reminds us that the U.S. Supreme Court held in *Williams,* 529 U.S. 362, that the state court's decision must be evaluated against the "clearly established" Supreme Court precedent at the time the petitioner's conviction became final. *Id.* at 380.

One thing is clear: No Supreme Court case has addressed the precise language at issue in this case. As we will show, the cases decided *after* Cone's conviction became final indicate clearly that the language of the HAC aggravator the jurors used to sentence Cone to death – "especially heinous, atrocious, or cruel in that it involved torture or depravity of mind" – is unconstitutionally vague. Normally, post-*Cone* decisions would be immaterial, but, as will be seen, the Supreme Court's fairly recent application of its doctrine of the "non-retroactivity" of new constitutional rules, in the context of an Eighth Amendment vagueness challenge to a death penalty instruction, makes several post-*Cone* Supreme Court decisions not only material, but controlling.

In 1988, in *Maynard v. Cartwright,* 486 U.S. 356, a death penalty case from Oklahoma, the Supreme Court explicitly relied upon *Godfrey* (the "outrageously or wantonly vile, horrible or inhuman" aggravator) to hold that

Oklahoma's HAC aggravator was unconstitutionally vague, *id.* at 363-64, but implied that had Oklahoma's HAC aggravator been further limited by a "torture or serious physical abuse" instruction, it might have been constitutional, *id.* at 365. Nonetheless, two years later, in *Shell v. Mississippi,* 498 U.S. 1 (1990) (*per curiam*), the Supreme Court announced that the "heinous, atrocious, or cruel" language, along with the same "limiting" definitions as were provided to the jury in Cone's case, was unconstitutional. *Id.* at 1. The HAC aggravator in *Shell,* however, did not have the "torture or depravity" qualifier that is attached to the HAC aggravator in Cone's case. In *Walton v. Arizona,* 497 U.S. 639 (1990), *overruled on other grounds by Ring v. Arizona,* 536 U.S. 584 (2002), the Court stated, "there is no serious argument that Arizona's 'especially heinous, cruel or depraved' aggravating factor is not facially vague." *Id.* at 654.

Despite the confusion resulting from these cases (or perhaps because of it), the Supreme Court, in *Stringer v. Black,* 503 U.S. 222 (1992), came at the subject from a different angle. It addressed the "new rule" non-retroactivity doctrine as respects *Godfrey,* the pre-*Cone* decision, and *Maynard,* the post-*Cone* decision.

> [T]he language [in *Maynard* ("especially heinous, atrocious or cruel")] gave no more guidance than did the statute in *Godfrey* [("outrageously or wantonly vile, horrible or inhuman")]. . . .
>
> . . . *Godfrey* and *Maynard* did indeed involve somewhat different language. But it would be a mistake to conclude that the vagueness ruling of *Godfrey* was limited to the precise language before us in that case. In applying *Godfrey* to the

> language before us in *Maynard,* we did not "brea[k] new ground."

Id. at 228-29 (quoting *Butler v. McKellar,* 494 U.S. 407, 412 (1990)). The "break new ground" terminology refers to the rule announced in *Teague v. Lane,* 489 U.S. 288 (1989), that if a decision announces a "new" constitutional rule, it is not to be applied retroactively to convictions that have already become final when the new decision is announced, subject to two narrow exceptions not applicable here. A "new [constitutional] rule" is one that "breaks new ground" or imposes new obligations on the states or federal government. *Id.* at 301. "[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* (emphasis omitted).

Given this old rule/new rule definition, the language of *Stringer,* that *Maynard* did not "break new ground," strongly suggests that the Supreme Court considers *Godfrey* to have clearly established the unconstitutionality of the HAC aggravator as early as 1980. Although *Stringer* dealt with a pre-AEDPA retroactivity issue, the Supreme Court in *Williams v. Taylor,* 529 U.S. 362, explained that the "clearly established law" requirement codified the old rule/new rule doctrine of non-retroactivity that prevailed before AEDPA. *Id.* at 379-80, 412; *see also Harris v. Stovall,* 212 F.3d 940, 944 (6th Cir. 2000). Indeed, the Court cited *Stringer* as an example of the old rule/new rule doctrine codified by AEDPA's "clearly established law" requirement. *Williams,* 529 U.S. at 412.

Although none of these Supreme Court decisions is "on all fours" with the instruction in Cone's case, in the final analysis, *Stringer's* statement that *Maynard's* invalidation

of Oklahoma's HAC aggravator was an "old rule" dictated by *Godfrey,* points ineluctably to the conclusion that *Godfrey* represents a "clearly established" Supreme Court precedent dictating that Tennessee's HAC aggravator is unconstitutionally vague. Although it is true that the HAC aggravator in Cone's case contained the additional words "in that it involved torture or depravity of mind," all of those words except "torture" have been held to be too vague, on the basis of *Godfrey.* Since *Maynard* was dictated by *Godfrey,* it is difficult to imagine how any of the other cases addressing very minor variations on the instruction in *Maynard* and *Cone* would not also be dictated by *Godfrey.*

There remains, of course, the question whether the Tennessee Supreme Court's narrowing construction of Tennessee's HAC aggravator, announced in 1981 in *Dicks,* 615 S.W.2d at 132, that Tennessee's HAC aggravator should be read as meaning "conscienceless or pitiless crime which is unnecessarily torturous to the victim," the identical language that was approved in *Proffitt,* 428 U.S. at 255, "saves" the HAC aggravator in Cone's case.

The State argues that if we are to indulge the fiction, discussed earlier, that the Tennessee Supreme Court "implicitly reviewed" Cone's Eighth Amendment vagueness "challenge" to the HAC aggravator, a challenge Cone did not explicitly raise, we should also indulge the fiction that the court applied the "pitiless crime" narrowing construction it adopted for Tennessee's HAC aggravator three years earlier in *Dicks,* 615 S.W.2d at 132. Although this "implicit narrowing construction" argument would provide a nice symmetry to the earlier "implicit review" argument, we think the two, on close consideration, are actually asymmetrical. Here's why: The Tennessee court

explicitly reviewed whether the HAC aggravator the jury found was supported by sufficient evidence, but in doing so, it did not apply, or even mention, any narrowing interpretation or cite to *Dicks.* Instead, the court simply, but explicitly, satisfied itself that the labels "heinous, atrocious, or cruel," without more, applied to Cone's crime. *State v. Cone,* 665 S.W.2d at 94-95.

Therefore, we conclude that the Tennessee Supreme Court's "implicit decision," upon mandatory review of Cone's death sentence, was that the HAC aggravator relied upon by Cone's jury in imposing the death sentence was not arbitrary and, consequently, not unconstitutionally vague. We hold that this decision by the Tennessee Supreme Court was contrary to clearly established U.S. Supreme Court precedent as announced in *Maynard* and *Shell,* and made applicable to Cone's case via the rule of retroactivity explained in *Stringer.*

We are not in the least comfortable with this "implicit review" doctrine, but it is a matter of Tennessee, not federal, law, and we know of no other way to read and understand what the Tennessee Supreme Court said in *West.*

V.

We must now consider whether the jury's erroneous application of two invalid aggravating factors was harmless error. The AEDPA standard of review *does not apply* to this question because no Tennessee court has considered this question. Thus, this is an independent harmless error inquiry, not a review of a state court's harmless error inquiry.

Cone contends that this court is not empowered to perform an independent harmless error inquiry; rather, he argues, this court must grant *habeas* relief so that state courts can perform a new sentencing calculus. He insists that prior Sixth Circuit cases, *Houston v. Dutton,* 50 F.3d 381 (6th Cir. 1995), and *Coe v. Bell,* 161 F.3d 320, are in conflict on this issue.

In *Coe v. Bell,* we held that this court was "permitted to perform a harmless-error analysis" to determine whether a Tennessee jury's reliance on the unconstitutional HAC aggravator required *habeas* relief. 161 F.3d at 334. We distinguished our previous decision in *Houston v. Dutton,* 50 F.3d at 387, on the ground that *Houston* had prohibited a federal *habeas* court from "re-weighing" but had not considered whether a federal *habeas* court could evaluate, in the first instance, the harmlessness of the jury's reliance on an invalid aggravator. *Coe,* 161 F.3d at 335. Thus, *Coe* drew a distinction between re-weighing and harmless error analysis and held that a federal *habeas* court is permitted to undertake the latter.

The applicable harmless error standard is "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* (quoting *Brecht v. Abrahamson,* 507 U.S. 619, 623 (1993)). The Supreme Court elaborated on this standard to some extent in *O'Neal v. McAninch,* 513 U.S. 432 (1995), by explaining: "When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict, that error is not harmless." *Id.* at 436 (internal quotation marks omitted); *see also DePew v. Anderson,* 311 F.3d 742, 751 (6th Cir. 2002), *cert. denied,* 124 S.Ct. 270 (2003), *and cert. denied,* 124 S.Ct. 83 (2003).

In *Coe v. Bell,* 161 F.3d at 335, we considered whether the jury's reliance on an unconstitutionally vague HAC aggravating factor had a "substantial and injurious effect" on the sentence. We concluded that it did not because the jury's sentencing verdict form indicated that "the jury [had] ignored the problematic 'depravity' factor and limited its finding to the appropriately narrowing 'torture' factor." *Id.* at 336. Thus, the error was harmless because the jury, effectively, had "channeled" its own discretion despite the failure of the instructions to do so. *Id.*

In *Abdur'Rahman v. Bell,* 226 F.3d 696 (6th Cir. 2000), *cert. denied,* 534 U.S. 970 (2001), we again considered the harmfulness of the jury's reliance on the unconstitutionally vague HAC aggravator. We remarked that "removing one aggravating circumstance from the sentencing calculus in a weighing state normally would require a re-weighing of the aggravating and mitigating factors." *Id.* at 711. We determined, however, that the jury's reliance on the HAC aggravator was harmless because, "even if the heinous, atrocious, or cruel aggravator is removed from the calculus, there is no mitigating evidence to weigh against the remaining . . . aggravators." *Id.*

In this case, when the jury made its sentencing determination it found four aggravating circumstances ((1) HAC; (2) great risk of death to others; (3) prior violent felonies; and (4) murder for purpose of avoiding arrest/prosecution), and weighed those against the mitigating evidence offered by the defense. This balancing process was infected by the weight of two invalid aggravating factors: (1) HAC, which was unconstitutionally vague, and (2) great risk of death to others, which was not supported by sufficient evidence.

The prosecutor specifically emphasized the HAC aggravator during his closing arguments at the sentencing phase of the trial. In contrast to *Coe,* 161 F.3d at 336, the jury here did not "channel[]" its discretion by ignoring the vagueness inherent in the HAC aggravator. Moreover, although the defense here offered no mitigating evidence at sentencing, the Supreme Court stated in *Bell v. Cone,* 535 U.S. at 699, that the defense put before the jury "the most compelling mitigating evidence in the case" during the guilt phase. The Court's observation thus distinguishes this case from *Abdur'Rahman,* in which we concluded that the HAC aggravator, if unconstitutionally vague, did not substantially affect the sentence due to the total absence of mitigating evidence.

The second invalid aggravator, "great risk of death to others," was found by the jury despite insufficient evidence, *State v. Cone,* 665 S.W.2d at 95, even though the prosecutor did not request the jury to find this aggravator. One could argue that this aggravator must have influenced the sentencing decision, since the jury found it without sufficient evidence and without being asked to do so by the prosecution. In any event, we conclude that these two invalid aggravators, together, if not individually, "'had substantial and injurious effect or influence in determining'" the jury's sentence. *Brecht,* 507 U.S. at 631 (citation omitted). The error, therefore, is not harmless.

VI.

For the foregoing reasons, the district court's decision is **REVERSED** as to the petitioner's sentence. We **REMAND** to the district court with instructions to issue a writ of *habeas corpus* vacating the petitioner's death

sentence due to the jury's weighing of an unconstitutionally vague aggravating factor at sentencing, unless the State conducts a new penalty phase proceeding within 180 days of remand.

CONCURRENCE

MERRITT, Circuit Judge, concurring.

I agree with the Court that this death case cannot be disposed of on grounds of procedural default, and I agree on the merits of the constitutional issue. I believe there are additional reasons that the Court is right and that the State's position is untenable.

I. Procedural Default

In this case, the jury found that the crimes were "especially heinous, atrocious, or cruel in that [they] involved torture or depravity of mind." (J.A. at 235, 237 (verdict forms)). Pursuant to its statutory mandate, the state supreme court automatically reviews, *inter alia,* whether the sentence of death was imposed in any arbitrary fashion and whether the evidence supported the jury's finding of a statutory aggravating circumstance. *See* Tenn. Code Ann. § 39-2-205(c)(1), (2) (1982). On direct review in this case, the state supreme court expressly examined the evidence presented at trial and determined that the evidence was sufficient for the jury to find that the murders were "especially heinous, cruel, or atrocious

in that they involved torture or depravity of mind." *State v. Cone,* 665 S.W.2d 87, 94-95 (Tenn. 1984).

In *State v. Harris,* the jury found three aggravating circumstances to support the death penalty, including that the crimes were "especially heinous, atrocious, or cruel in that [they] involved torture or depravity of mind." 839 S.W.2d 54, 59-60 & n.1 (Tenn. 1992). On direct appeal, the defendant did not raise any specific vagueness challenge to the aggravator or challenge the sufficiency of the evidence in support of it. Nevertheless, the state court clearly examined both aspects of the aggravator as part of its statutory review of the sufficiency of the evidence:

> The Defendant has not challenged the sufficiency of the evidence to support the aggravating circumstances found by the jury to warrant imposition of the death penalty in this case. Nonetheless, as in all capital cases, under the directive of T.C.A. § 39-13-206(c)(1)(B) [formerly T.C.A. § 39-2-205(c)(2)], this Court has reviewed the evidence pertaining to the aggravating circumstances and concludes that it is sufficient to support the aggravating circumstances found by the jury in this case.

Id. at 76. Two dissenting justices would have held that sentence invalid based on the "heinous, atrocious, or cruel" aggravator as applied to the evidence in the case because the instruction did not sufficiently guide the jury's discretion as a matter of constitutional law. Noting that the jury's application of the aggravator could only have been based on a finding of depravity, the dissenting justices concluded that "the instructions provided no help in guiding the jury to its decision" because the jury "received no guidance in determining whether the defendant's mind

was materially 'depraved' beyond that of any first degree murderer, and was bestowed unconstitutionally unfettered and unguided discretion in applying this aspect of [the] aggravating circumstance." *Id.* at 83-84 (Reid, C.J. dissenting) (citing *Shell v. Mississippi,* 498 U.S. 1 (1990)). The majority responded to the "dissent['s] challenge[] [to] the validity in the present case of the aggravating circumstance" by setting forth evidence in support of the aggravator and holding that the jury was "fully and correctly instructed" on the aggravator in accord with *State v. Williams,* 690 S.W.2d 517, 529 (Tenn. 1985).[1]

Harris demonstrates that, in a death penalty case, the state supreme court's mandatory review of the sufficiency of the evidence to support the jury's finding of an aggravator necessarily includes an affirmative examination of whether the aggravator, either as instructed or as viewed by the reviewing court through a narrowing construction, sufficiently narrowed the class of persons eligible for the death penalty. As a result, there can be no doubt in this case that the state court reviewed the "heinous, atrocious, and cruel" aggravator on the merits and determined that it was not unconstitutionally vague.

Moreover, there is nothing in the record that would constitute a clear and express statement that the state court disposed of this issue on state procedural grounds, a

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[1] Approximately one year after the state supreme court upheld Cone's death sentence, the Tennessee Supreme Court decided *State v. Williams,* in which it construed "depravity of mind" in cases where there was no evidence of torture. 690 S.W.2d at 529-30. The construction was intended to comport with constitutional requirements by sufficiently narrowing the class of persons eligible for the death penalty as required by *Godfrey v. Georgia,* 446 U.S. 420 (1980).

prerequisite to the deference to state decisionmaking that our federal doctrine of procedural default aims to protect. Cone first presented his challenge to the constitutionality of the aggravator in paragraph 18 of his second amended post-conviction petition. In dismissing the ground, the trial court did not state that the claim had been waived, as the State asserts in its brief before this Court, but that "grounds 17, 18 [which included his challenge to the constitutionality of the aggravator], 19, 21, 22, 23, 34, 35, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36 involve[] a potpourri of various errors by the court at the trial all of which grounds have been considered and denied in direct appeal or the First Post Conviction Petition." *Cone v. State,* No. P-06874, slip op. at 4 (Crim. Ct. Tenn., 13th Judicial Dist., Dec. 16, 1993). In affirming the trial court's ruling, the Tennessee Court of Appeals did not expressly address Cone's claim for relief based on the "heinous, atrocious, or cruel" aggravator, but agreed with the trial court that all of Cone's claims had been "previously determined or waived." This language, in light of the state supreme court's mandatory review on direct appeal, "gives a federal court good reason to question whether there is an adequate and independent state ground for the decision." *O'Guinn v. Dutton,* 88 F.3d 1409, 1423 (6th Cir. 1996) (Merritt, J., concurring).

To the extent that the decision of the state court of appeals can be read as an "unexplained ruling" due to its failure to specify that a procedural default has been expressly invoked to dispose of this particular claim, we must refer to the only reasoned state court judgment addressing the aggravator, which in Cone's case is the state supreme court's express consideration of the aggravator on direct appeal. *See Ylst v. Nunnemaker,* 501 U.S.

797, 803 (1991) ("If an earlier opinion 'fairly appears [] to rest primarily on federal law,' . . . we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place"); *O'Guinn,* 88 F.3d at 1423. As explained above, we can presume that, in ruling that the evidence supported the jury's finding that the crimes were "especially heinous, atrocious or cruel," the state supreme court, as in *Harris,* fulfilled its statutory duty to test the constitutionality of the aggravator. Further, contrary to the State's assertion, no state court has clearly and expressly stated that its disposition on the issue was based on the independent and adequate state ground of waiver, as required by *Harris v. Reed,* 489 U.S. 255, 263 (1989), and *Coleman v. Thompson,* 501 U.S. 722, 735 (1991).

Our view is reinforced by *State v. West,* 19 S.W.3d 753 (Tenn. 2000), in which the constitutionality of an aggravator was raised. The state supreme court ruled that it had previously determined the constitutionality of the aggravator on direct appeal pursuant to its statutory mandate "to automatically consider whether the 'evidence supports the jury's finding of a statutory aggravating circumstance or statutory aggravating circumstances.'" *Id.* at 756. *West* demonstrates that the Tennessee Supreme Court understands its statutory obligation to review death sentences as carrying with it the affirmative responsibility to keep the application of the statutory aggravators within constitutional bounds. *See Godfrey v. Georgia,* 446 U.S. 420, 429 (1980) (noting the Georgia Supreme Court's previous exercise of its responsibility to keep the application of the "outrageously or wantonly vile, horrible and inhuman" aggravator within constitutional bounds).

II. Cause and Prejudice

Even if Cone had procedurally defaulted his objection to the "heinous, atrocious, and cruel" aggravator, this Court can still hear the claim if Cone can establish "cause and prejudice" for the default. *Coleman,* 501 U.S. at 750. Cone argues that his failure to raise the objection on direct appeal was due to the ineffectiveness of his counsel. Ineffective assistance of counsel, if established, can be sufficient to establish cause and therefore allow a federal court to reach the merits of a claim defaulted in a state court so long as the ineffectiveness rises to the level of a Sixth Amendment violation resulting in prejudice to the defendant. *Murray v. Carrier,* 477 U.S. 478, 488 (1986).

In this case, counsel was allegedly ineffective at two stages of the proceeding in failing to raise the constitutional objection to the instruction – at trial and on appeal. Before we can decide if Cone has established ineffective assistance of counsel as cause of the failure to object at trial and on appeal, we must first decide whether Cone has properly exhausted the ineffectiveness claim in the state courts. When a petitioner claims ineffective assistance of counsel as cause for a procedural default in state court of a substantive constitutional claim, the allegation of ineffectiveness is a separate claim which must itself be exhausted in state court according to the normal procedures. *Edwards v. Carpenter,* 529 U.S. 446, 452 (2000); *Murray v. Carrier,* 477 U.S. 478, 489 (1986) ("[T]he exhaustion doctrine . . . generally requires that a claim of ineffective assistance of counsel be presented to state courts before it may be used to establish cause for a procedural default."). According to *Edwards,* the failure to exhaust the ineffectiveness claim will itself constitute a procedural default of the procedural default defense and,

absent cause and prejudice, will prevent federal courts from hearing it. 529 U.S. at 452. A petitioner cannot easily establish cause for the third default, because there is no constitutional right to counsel at post-conviction hearings, according to *Coleman,* and without such a right ineffective assistance of counsel cannot constitute cause for a procedural default. 501 U.S. at 752.

It is clear from the record that Cone did not waive his ineffective assistance of counsel claim. Cone raised a general claim of ineffective counsel in his first post-conviction petition. Although he did not claim specifically in that first petition that his counsel was ineffective because of the failure to object to the vague "heinous, atrocious, and cruel" aggravator, he added those grounds in his second post-conviction petition. Both the state trial court and the appellate court ruled that under Tennessee law, ineffective assistance of counsel is a "single ground for relief" that had been "previously determined" in the first post-conviction petition. J.A. at 2001. Therefore, even though Cone did not claim that his counsel was ineffective specifically because of the failure to object to the aggravator until his second post-conviction petition, he has not defaulted that claim because under Tennessee law it constitutes the same ground that the Tennessee courts had previously determined to be without merit.

Still, even though Cone has not procedurally defaulted his ineffective assistance of counsel claim, the message from *Edwards* is that in order to rely on the ineffectiveness claim as cause for his failure to raise the "heinous, atrocious, and cruel" aggravator, the issue must not only have been presented to, or at least determined by, the state courts, the restrictions on federal review from the Anti-Terrorism and Effective Death Penalty Act ("AEDPA")

must be satisfied as well. Specifically, § 2254(d) prevents federal courts from granting habeas "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim" was either "contrary to" or an "unreasonable application of' clearly established federal law. 28 U.S.C. § 2254(d) (2003); *Williams v. Taylor,* 529 U.S. 362, 402-13 (2000). Thus, we must determine whether the rejection of Cone's ineffective assistance of counsel claim by the Tennessee state courts in his post-conviction petitions was contrary to, or an unreasonable application of, clearly established federal law.

The starting point for ineffective assistance of counsel claims is *Strickland v. Washington,* 466 U.S. 668 (1984). According to *Strickland,* in order to establish a claim for the ineffective assistance of counsel, a petitioner must be able to show both that his counsel was constitutionally deficient and that the deficiency prejudiced his defense. *Id.* at 687; *Wiggins v. Smith,* 123 S. Ct. 2527, 2535 (2003); *Williams v. Taylor,* 529 U.S. 362, 390 (2000). Although the *Strickland* test is "highly deferential" to the judgment of defense counsel, 466 U.S. at 689, and the mere fact that counsel has failed to recognize or raise a particular claim does not always constitute cause for a procedural default, *Smith v. Murray,* 477 U.S. 527, 535 (1986); *Carrier,* 477 U.S. at 486-87, the Supreme Court has also made it clear that "the right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error . . . if that error is sufficiently egregious and prejudicial." *Murray,* 477 U.S. at 535 (quoting *Carrier,* 477 U.S. at 496); *see also Edwards,* 529 U.S. at 451 ("Although we have not identified with precision what constitutes 'cause' to excuse a procedural default, we have acknowledged that in certain

circumstances counsel's ineffectiveness in failing properly to preserve the claim for review in state court will suffice.").

In this case, there can be no doubt that the defense counsel's error was "sufficiently egregious and prejudicial" to constitute cause for his procedural default. The defense counsel failed both at trial and on direct appeal to object to the "heinous, atrocious, and cruel" aggravator despite the then-recent Supreme Court decision in *Godfrey v. Georgia,* 446 U.S. 420 (1980), in which the Court held similar language to be unconstitutionally vague. Indeed, as the Court here points out, not only did the principle established in *Godfrey* mean that the "heinous, atrocious, and cruel" aggravator was unconstitutional (as explained later in *Maynard v. Cartwright,* 486 U.S. 356 (1988)), to rule otherwise as the Tennessee Supreme Court did in its mandatory review was contrary to clearly established Supreme Court precedent even according to the high standards of AEDPA as interpreted in *Williams v. Taylor.* Cone's defense counsel missed, both at trial and on direct appeal, a claim of clearly established constitutional dimension, the preservation of which would result in having one of the aggravators on which Cone was sentenced to death thrown out. Failing to raise a winning defense is not a strategic decision, and incompetence is the only explanation for the failure to raise it. It appears that Cone's counsel was litigating a capital case while simply unaware of controlling Supreme Court precedent in death penalty cases. It is hard to imagine a better case for "ineffectiveness in failing properly to preserve [a] claim for review in state court." *Edwards,* 529 U.S. at 451.

This conclusion is further supported by the American Bar Association's Guidelines for the Appointment and

Performance of Defense Counsel in Death Penalty Cases. As pointed out in *Strickland,* "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." 466 U.S. at 688. American Bar Association standards are only "guides" and not "rules" for what constitutes ineffective assistance of counsel, *id.*, but in this case the guidelines speak clearly:

> One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review. Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial. For this reason, trial counsel in a death penalty case must be especially aware not only of strategies for winning at trial, but also of the heightened need to fully preserve all potential issues for later review.

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 91-92 (rev. ed. 2003) (internal quotations omitted).[2] In this case, not only did Cone's counsel fail to preserve "any and all" errors, he failed to preserve a claim based on binding Supreme Court precedent that was a sure winner as a matter of federal law and that, given the role of the "heinous, atrocious, and cruel" aggravator in the jury's deliberation of the death sentence,

[2] Although the above quotation is a recent statement not published at the time of Cone's trial, I use it because it is an articulation of long-established "fundamental" duties of trial counsel. See *Hamblin v. Mitchell,* 354 F.3d 482, 487 (6th Cir. 2003) (applying 1989 ABA guidelines to counsel's 1982 representation on the grounds that "the standards merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases").

may well have saved his client's life. There can be no doubt that this error was "sufficiently egregious and prejudicial" to constitute cause for the procedural default of that claim.

III. Contrary to Established Supreme Court Cases

Finally, I have no trouble finding that the denial of Cone's claim that his counsel was ineffective due to the failure to object to the "heinous, atrocious, and cruel" aggravator was not only wrong, but contrary to clearly established federal law as required by AEDPA and *Williams.* Although the error at issue here involves the failure to raise a claim rather than the failure to investigate at issue in *Strickland* and *Wiggins,* the differences do not mean that the Tennessee courts' rejections of his valid ineffectiveness claim are not contrary to the clearly established test from *Strickland.* As the Supreme Court explained in *Williams,* "[t]hat the *Strickland* test 'of necessity requires a case-by-case examination of the evidence' . . . obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by this Court." 529 U.S. at 391 (citation omitted). The *Strickland* test is well-established, and is itself based on a long established right to effective counsel. *See id.* ("[I]t can hardly be said that recognizing the right to effective counsel breaks new ground or imposes a new obligation on the states." (internal quotations omitted)).

The *Strickland* test requires not only ineffectiveness of counsel, but also prejudice to the defendant as a result of that ineffectiveness. 466 U.S. at 687. For the purposes of this test, prejudice amounts to a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Demonstrating such a reasonable probability is not difficult here. As the Court explains in its harmless error analysis, *supra,* the prosecutor specifically emphasized the "heinous, atrocious, and cruel" aggravator during closing arguments and at the sentencing phase of the trial. Moreover, this is the second invalid aggravator found by the jury. Thus, there is at the very least a reasonable probability that had Cone's counsel preserved the objection to this "heinous, atrocious, and cruel" aggravator, his sentence ultimately may well have been different.

IV. The Merits

As is now typical in death penalty cases, we have spent more time discussing the maze of "door closing" devices such as procedural default than the merits. In this case, the merits are relatively easy to decide.

The Court concludes that applying the "heinous, atrocious, and cruel" aggravator to Cone's case was not only wrong but contrary to clearly established federal law as required by AEDPA and *Williams* because similar language was ruled unconstitutional in *Godfrey.* The Court cites *Maynard* for support of this proposition, which specifically held that an identical Oklahoma "heinous, atrocious, and cruel" aggravator was unconstitutional. Although *Maynard* was not decided until 1988 – after the Tennessee Supreme Court upheld Cone's conviction – because the Court in *Maynard* said that it was only applying the clear principle of *Godfrey* and not establishing new law, this Court today cites it for the proposition that Tennessee's upholding the "heinous, atrocious, and cruel" aggravator was contrary to clearly established federal law.

I agree with the Court despite the state counsel's objection to reliance on a later case to determine what law had been then clearly established. I would only add that the Supreme Court recently did precisely the same thing in *Wiggins v. Smith,* 123 S. Ct. 2527, 2535-36 (2003), despite an identical objection by the dissenting justices in that case. *Id.* at 2546-47. In that case, the Court applied the rule of *Strickland v. Washington,* which was decided before Wiggins' state court ruling, but also cited *Williams v. Taylor,* which was decided *after* Wiggins' state court decision. *Id.* Since the Court in *Williams* had "made no new law in resolving Williams' ineffectiveness claim," *id.* at 2535, the *Wiggins* Court was free to cite *Williams* in determining whether or not the state court ruling against Wiggins was contrary to clearly established federal law, even though *Williams* was decided *after* the state court ruled against Wiggins. Similarly, as the Supreme Court later said when discussing non-retroactivity, "[i]n applying *Godfrey* to the language before us in *Maynard,* we did not 'break[] new ground.'" *Stringer v. Black,* 503 U.S. 222, 228-29 (1992) (quoting *Butler v. McKellar,* 494 U.S. 407, 412 (1990)). Therefore, *Wiggins* reinforces our reliance on *Maynard's* application of *Godfrey* when determining what was "clearly established federal law" at the time of Cone's state court decision even though *Maynard* was not yet decided. In *Houston v. Dutton,* 50 F.3d 381 (6th Cir. 1995), our Court did the same thing in invalidating the same Tennessee instruction. We cited *Richmond v. Lewis,* 506 U.S. 40, 46 (1992), a case decided after Houston's last state court decision, to find the same "heinous, atrocious, or cruel" aggravator unconstitutional because *Richmond* simply applied the principle enunciated in *Godfrey* and *Maynard.*

For these reasons, as well as those articulated by the Court, I agree with the Court's ruling.

DISSENT

ALAN E. NORRIS, Circuit Judge, dissenting.

As my concurrence in this court's initial panel decision makes clear, *Cone v. Bell,* 243 F.3d 961 (6th Cir. 2001), I harbor grave reservations about the appropriateness of the death penalty in this case. However, our analysis was soundly rejected by the Supreme Court. *Bell v. Cone,* 535 U.S. 685 (2002). On remand, the majority concludes that the writ should issue on a ground not reached in our prior opinion. While I am reluctant to part company with my colleagues in this case, I feel obliged to do so because the majority's construction of Tennessee law with respect to "implicit review" as it applies to waiver lacks any clear support from the Tennessee courts. I therefore respectfully dissent.

To its credit, the majority candidly acknowledges the tenuousness of its position with respect to whether petitioner has procedurally defaulted his Eighth Amendment claim. For lack of more compelling authority, the majority hitches its wagon to *State v. West,* 19 S.W.3d 753 (Tenn. 2000), a case that it concedes contains a "seeming contradiction" because it holds that defendant's vagueness claim was both "previously determined" and "waived." Maj. Op. at 11 (citing *West,* 19 S.W.3d at 756). However, *West* primarily focuses upon waiver: "[W]hen *West* failed to raise

the [vagueness] issue on direct appeal, he effectively blocked any consideration of this issue by this Court on post-conviction review." *West,* 19 S.W.3d at 756.

In *Coe v. Bell,* 161 F.3d 320 (6th Cir. 1998), an opinion in which I also concurred, we reviewed a district court reading of Tennessee Code Ann. § 39-2-205 (1982) for "the notion that, in capital cases, the state supreme court has to review significant errors, whether or not they were raised by the defendant." *Id.* at 336. *Coe* rejected this reading as "too broad, as it would eliminate the entire doctrine of procedural bar in Tennessee capital cases." *Id.* As the majority points out, virtually every other circuit that has reviewed analogous state-law provisions has expressed similar concerns. Majority Op. at 7-8 (citing cases). Aware of the potential sweep of its conclusion, the majority seeks to reign it in by drawing the following distinction:

> [T]he implicit review doctrine, as we apply it today in this case, does not foreclose the possibility that other death penalty defendants may procedurally default on other constitutional issues not raised on direct appeal. The language of Tennessee's mandatory review statute provides a basis to distinguish between vagueness challenges and other constitutional claims, since it requires the Tennessee Supreme Court to look specifically for sentences "imposed in any arbitrary fashion."

Maj. Op. at 13. Given that the scope of procedural default is a matter of state law, I would be much more comfortable if the majority had cited a single Tennessee opinion that explicitly draws this distinction. Frankly, I do not find it in *West*, and the majority concedes that "[t]he conceptual leap from [reviewing] claims explicitly raised on direct appeal,

although not properly preserved, to claims not raised at all is significant and, without *West*, there would be no Tennessee authority for attempting it." Maj. op. at 12. Given the inherent contradictions in *West*, it is a leap that I am unwilling to make without further guidance from the courts of Tennessee.

For the foregoing reasons, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

GARY BRADFORD CONE, Petitioner, v. RICKY BELL, Warden, Respondent.	)	No. 97-2312 M1/A

ORDER OF DISMISSAL
ORDER DENYING CERTIFICATE OF APPEALABILITY
ORDER CERTIFYING APPEAL NOT TAKEN IN
GOOD FAITH ORDER LIFTING STAY OF EXECUTION

(Filed Jan. 29, 1999)

In its May 15, 1998 order in this matter, the Court dismissed several of the grounds for relief raised by Petitioner Gary Bradford Cone in his petition for a writ of habeas corpus. After further argument and consideration of the issues raised, the Court DISMISSES the remaining grounds for relief raised by Petitioner and DISMISSES the petition.

Background

In its May 15, 1998 order, the Court laid out in detail the facts underlying Petitioner's conviction and the course of the state court proceedings in this matter. The Court will not restate these facts at this point and will only relate the history of this petition.

Petitioner originally filed his petition for a writ of habeas corpus in the Middle District of Tennessee. It was subsequently transferred to this Court, which granted Petitioner a stay of execution and appointed counsel to assist Petitioner in amending and presenting his petition.

On July 1, 1997, Petitioner filed his amended petition in this Court. Originally, the Court denied Respondent's motion to apply the provisions of 28 U.S.C. §§ 2261-2266 (1998) to this matter and granted Petitioner's motion to declare the requirements of 28 U.S.C. §§ 2241-2255 (1998) inapplicable. On January 26, 1998, however, the Court reconsidered its earlier order and found that 28 U.S.C. §§ 2241-2255 (1998) should apply to the analysis of this petition.

When Petitioner requested an evidentiary hearing on some of the issues raised in his petition, the Court denied that request pursuant to 28 U.S.C. § 2254(e)(2) (1997) on May 15, 1998. In that same order, the Court dismissed the grounds for relief that Petitioner had addressed in his motion for an evidentiary hearing. Those claims then dismissed included: 1) that the prosecution withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963);[1] 2) that Petitioner was denied the effective assistance of counsel in violation of *Strickland v. Washington*, 466 U.S. 668 (1984);[2] 3) that the Prosecution engaged in prosecutorial misconduct;[3] 4) that the use of

[1] For the sake of consistency, the Court adopts the numbering of claims used by Petitioner in his petition filed on July 1, 1997. Petitioner's *Brady* claim was raised in paragraph 39.

[2] Petitioner raised this claim in paragraph 40.

[3] Petitioner raised this claim in paragraph 41.

electrocution constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments;[4] and 5) that his inability to sit with his counsel at trial deprived him of a fundamentally fair trial.[5]

On August 27, 1998, the Court denied as moot Petitioner's motion for reconsideration of his claim that the use of electrocution constitutes cruel and unusual punishment. Contending that recent decisions by the Court of Appeals for the Sixth Circuit called into doubt the Court's earlier dismissal of his claims, Petitioner also moved the Court for reconsideration of the other dismissed claims. On October 22, 1998, the Court also denied this motion. The Court reiterated its finding that Petitioner had procedurally defaulted most of the claims addressed in the May 15, 1998 order.[6] On October 23, 1998, the Court provided each of the parties with an opportunity to present final oral arguments to the Court.

Discussion

A. Procedurally Defaulted Claims.

Petitioner asserts numerous claims in this petition that he first raised in his second petition for post-conviction relief. The trial court denied all the claims raised in that petition because they were either previously determined or waived. *See Cone v. State*, P-06874 (Tenn.

[4] Petitioner raised this claim in paragraph 61.

[5] Petitioner raised this claim in paragraph 65.

[6] The Court notes that the recent decision in *Coe v. Bell*, ___ F.3d ___, 1998 WL 789087 (6th Cir. Nov. 16, 1998), supports the Court's May 15, 1998 analysis of procedural default. *See Coe*, 1998 WL 789087, at *5.

Crim. Ct. Dec. 16, 1993). This judgment was affirmed on appeal. *See Cone v. State*, CCA No. 02C01-9403-CR-00052 (Tenn. Crim. App. Mar. 22, 1995). The Tennessee Supreme Court denied permission to appeal, *see Cone v. State*, No. 02C01-9403-CR-00052 (Tenn. Mar. 4, 1996), and thus the opinion of the Court of Criminal Appeals stands as the final word from the Tennessee courts on the claims addressed only in his second post-conviction petition.

Absent the rare situation where a state provides no effective process to remedy a constitutional violation, a federal court may only grant relief on claims raised in a petition for a writ of habeas corpus that have been exhausted in the state courts. *See* 28 U.S.C. § 2254(b)(1) (1998). To satisfy this requirement a state court normally must have addressed the substance of an asserted claim. When a state court declines to address the merits of a claim based on an adequate and independent state ground, such as a procedural bar that prohibits consideration of the merits of that claim, the petitioner's procedural default bars a federal court from granting relief unless he can show cause and prejudice for the default. *See Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977).

Additionally, in order to exhaust a claim, a petitioner must give fair notice to the state courts of the facts and specific laws, supporting a claim. "It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (citations omitted); *see also Picard v. Connor*, 404 U.S. 270, 276-77 (1971). As the Court notes several times in this order, Petitioner's presentation of a claim to the Tennessee Supreme Court without alleging a violation of the Federal Constitution did not give that court notice of

the substance of his claim and a chance to address the federal constitutional basis of that claim. Those claims are therefore not preserved for habeas review.

As this Court found in its May 15, 1998 order and the Court of Appeals for the Sixth Circuit held in *Coe v. Bell*, ___ F.3d ___, 1998 WL 789087 (6th Cir. Nov. 16, 1998), the finding of the Court of Criminal Appeals that Cone's claims raised only in his second petition for post-conviction relief were previously determined or waived is an adequate and independent ground that bars the consideration of these claims in this Court. *See Coe*, 1998 WL 789087, at *5.

The claims raised in the following paragraphs of Cone's petition for habeas corpus relief are therefore procedurally defaulted:

> paragraph 37 (claiming that the jury instructions on malice relieved the prosecution of its burden of proof);
>
> paragraph 38 (claiming the jury instruction on reasonable doubt relieved the prosecution of its burden of proof);
>
> paragraph 42(a) (claiming that the trial court's instructions on the "heinous, atrocious, and cruel" aggravating circumstance were deficient);
>
> paragraph 43 (claiming constitutional deficiencies in Tennessee's death penalty statute, TENN. CODE ANN. § 39-2-203 (1982) (repealed));[7]

[7] Since his conviction, Tennessee has repealed the death penalty statute under which Petitioner was convicted and enacted in its place TENN. CODE ANN. §§ 39-13-201 to 218 (1998). *See* TENN. ACTS 1989, ch.

(Continued on following page)

paragraph 46 (claiming various constitutional infirmities with the instructions used in the guilt phase of Petitioner's trial);

paragraph 47 (claiming various constitutional infirmities with the instructions used at the sentencing phase of Petitioner's trial);

paragraph 48 (claiming the trial court committed various errors in relation to jury selection and other matters at trial);[8]

paragraph 49 (claiming that the trial court erred in not bifurcating Petitioner's trial);

paragraph 50 (claiming that the trial court erred in permitting a juror to comment on the implications of a life sentence);

paragraph 51 (claiming that the use of explicit photos deprived Petitioner of a fair trial);[9]

paragraph 52 (claiming that a trial identification of Petitioner was unduly suggestive);

paragraph 53 (claiming that the desire of the jurors to finish with the trial before the weekend violated Petitioner's rights);

591, § 1. Any objections of Petitioner are only relevant to the statute as it existed at the time of his state court proceedings.

[8] In his direct appeal, Cone objected to the trial court's excusing of jurors for religious reasons. *See* Pet'r's Appeal Br. at 36-43. As he did not inform the trial court of any claim based upon the Federal Constitution in this argument, it is not preserved for habeas review.

[9] In support of this claim in his brief on direct appeal, Petitioner cited Tennessee state law and the Federal Rules of Evidence, but no federal constitutional protections. *See* Pet'r's Appeal Br. at 50-51. His newly asserted constitutional grounds supporting this claim are therefore defaulted.

paragraph 54 (claiming that an illegal search of Petitioner's car violated Petitioner's rights);

paragraph 55 (claiming that explicit photographs and testimony about the smell in the victims' house violated Petitioner's rights);[10]

paragraph 57 (claiming that the testimony of Officer Flynn violated Petitioner's rights);[11]

paragraph 58 (claiming that the prosecution engaged in improper argument by suggesting that Petitioner had introduced no evidence at trial);

paragraph 59 (claiming that the prosecution engaged in inflammatory argument at the guilt phase of the trial that deprived Petitioner of his constitutional rights);[12]

paragraph 77 (claiming that the instructions to the jury on insanity were unconstitutional);[13] and

[10] *See* footnote 9, supra.

[11] In his appeal brief, Petitioner claimed only the support of Tennessee evidentiary law for this claim. *See* Pet'r's Appeal Br. at 49. His constitutional claim on similar facts is therefore defaulted.

[12] Petitioner stated a claim upon similar facts in his direct appeal brief. *See* Pet'r's Appeal Br. at 27-29. There, he claimed no constitutional protection and the lone federal case he cited, *Snipes v. United States*, 230 F.2d 165 (6th Cir. 1956), makes no indication that it rests on a constitutional provision. As the state court had no notice that Petitioner intended to rely upon the Federal Constitution for this claim, he is barred from raising it upon habeas. review.

[13] In support of this claim on direct appeal, Petitioner claimed support of no law. *See* Pet'r's Appeal Br. at 55. The Supreme Court of Tennessee could not have discerned the constitutional claim he now asserts, and thus the claim is defaulted.

paragraph 83 (claiming that the jury considered non-statutory aggravating circumstances in reaching its verdict in the sentencing phase).

Petitioner also presents a host or claims in this petition that were never presented to the state appellate courts. When a petitioner still has some state forum in which to seek redress of unexhausted claims, the proper action of a federal district court is to dismiss the entire petition so that the petitioner may bring his claims before the appropriate state forum. *See* 28 U.S.C. § 2254(b) (1998). On the other hand, if a petitioner asserts unexhausted claims for which there appears to be no remaining state corrective procedure, the federal court should dismiss those unexhausted claims unless the petitioner can demonstrate cause and prejudice for his failure to exhaust those claims. *See Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991); *Hannah v. Conley*, 49 F.3d 1193, 1195-96 (6th Cir. 1995).

Petitioner has contended that his trial and appellate counsel was ineffective, and that the Court should therefore excuse these defaults. *See* Notice of Supplemental Authority. There are several difficulties with this argument. First, Petitioner has not adequately presented this argument to the Court. The only reference in the pleadings to this argument is in a footnote to a discussion of the regularity of application of a state procedural bar. *See* Pet'r's Reply at 27 n.22. Second, even in his Reply and the recently filed Notice of Supplemental Authority, Petitioner only alleges that the ineffective assistance of his counsel constitutes cause to excuse his procedural defaults. In order to excuse a default, however, a petitioner must demonstrate prejudice as well as cause for the default. *See Coleman*, 501 U.S. at 750-51. The

requirement of demonstrating prejudice is not mere surplusage, but instead requires rigorous analysis by a reviewing habeas court. *See United States v. Frady*, 456 U.S. 152, 168-69 (1982). The burden of demonstrating the existence of prejudice rests squarely with the petitioner in a habeas proceeding. *See Maupin v. Smith*, 785 F.2d 135, 139 (6th Cir. 1986). As Petitioner has made no showing of prejudice, the Court does not excuse his procedural defaults.

Even if Petitioner had properly demonstrated prejudice resulting from these defaulted claims, the Court would be unable to address them on their merits. The alleged ineffectiveness of Petitioner's counsel cannot serve as cause to excuse these defaults. Petitioner seeks to rely upon *Carpenter v. Mohr*, ___ F.3d ___, 1998 WL 879733 (6th Cir. Dec. 18, 1998), for the opposite proposition. *Carpenter*, however, is not controlling upon these facts.

In *Carpenter*, the petitioner pled guilty to murder in order to avoid the death penalty but consistently maintained his innocence of that crime. A three-judge panel then found that he was guilty beyond a reasonable doubt. *See Carpenter*, 1998 WL 879733, at *1. On appeal, he challenged only the appropriateness of his sentence. *See, Carpenter*, 1998 WL 879733, at *2 n.3. In the circumstances under which the petitioner had entered his guilty plea, he was permitted to challenge the sufficiency of the evidence supporting his conviction. *See Carpenter*, 1998 WL 879733, at *7. More than two years after the appropriate limitations period had run, the petitioner moved to reopen his direct appeal to state a claim of ineffective assistance of counsel because of his appellate counsel's failure to contest the sufficiency of the evidence supporting his conviction on appeal. The Ohio intermediate and

highest courts dismissed this application as untimely. *See Carpenter*, 1998 WL 879733, at *2.

In his habeas petition to the district court, the petitioner alleged that there was insufficient evidence to support his conviction. In response to Ohio's assertion that he defaulted this claim by his failure to raise it on direct appeal, he asserted that his appellate counsel's ineffective assistance constituted cause and the dispositive nature of the claim demonstrated prejudice. *See Carpenter*, 1998 WL 879733, at *2, *4. The Court of Appeals for the Sixth Circuit held that the untimely presentation of the ineffective assistance claim satisfied the exhaustion requirement of *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986), and could therefore constitute cause for the default.

The Supreme Court has repeatedly counseled that habeas courts must show special consideration to a petitioner's claims that state a colorable claim of actual innocence. *See Herrera v. Collins*, 506 U.S. 390, 404 (1993) (noting the "'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons"); *Sawyer v. Whitley*, 505 U.S. 333, 335-336 (1992). The petitioner in *Carpenter* presented such a claim – he consistently stated the [sic] he was innocent and that the evidence was insufficient to support his conviction. None of Petitioner's claims that were defaulted because of the allegedly ineffective assistance of his trial and appellate counsels are of this type – they do not undermine the essential reliability of the Tennessee courts' finding that Petitioner in fact committed capital murder. As such, the Court cannot excuse Petitioner's failure to adequately and timely present these claims to the Tennessee courts.

Both because more than one year has elapsed since the denial on direct appeal of Petitioner's conviction and because he has already filed two petitions for state post-conviction relief, Petitioner is without a Tennessee forum in which to raise unexhausted claims.[14] The Court therefore dismisses the claims in the following paragraphs as unexhausted, but procedurally barred:

> paragraph 42(c) (claiming that the felony convictions used as an aggravating circumstance at the penalty phase were obtained in a constitutionally deficient manner);
>
> paragraph 45(e)-(1) (claiming that appellate review of Petitioner's conviction and sentence was constitutionally deficient for a variety of reasons);
>
> paragraph 60 (claiming that Tennessee has failed to demonstrate the necessity of the death penalty);
>
> paragraph 62 (claiming that the selection of the grand jury foreperson discriminated against both women and minorities);
>
> paragraph 63 (claiming that no proof of burglary, the predicate felony for Petitioner's felony-murder conviction, was presented at trial);[15]

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[14] Tennessee applies a one year limitations period to post-conviction actions and only permits a prisoner to file a single post-conviction petition. *See* TENN. CODE ANN. § 40-30-202 (1998). Petitioner is no longer able to take advantage of these post-conviction procedures.

[15] In his brief on direct appeal, Petitioner failed to assert that this alleged error deprived him of any federal constitutional right. *See* Pet'r's Appeal Br. at 30-34. The claim is therefore not preserved for habeas review.

paragraph 64 (claiming that use of the Bible by jurors at trial violated Petitioner's rights);

paragraph 66 (claiming that the unavailability of funds for expert assistance hindered Petitioner's ability to protect his rights);

paragraph 67 (claiming that Petitioner was convicted of both felony murder and premeditated first degree murder for the same offense);

paragraph 68 (claiming the trial court erred by not granting a mistrial after the prosecution accused Petitioner's counsel of unethical conduct);[16]

paragraph 69 (claiming the trial court erred in not granting a mistrial after the prosecution characterized Petitioner as an "animal");[17]

paragraph 70 (claiming the trial court erred in not granting a mistrial after the prosecution referred to excluded evidence);[18]

paragraph 71 (claiming that the trial court erred in allowing the prosecution to question a defense

[16] Although citing in passing a Supreme Court decision, *Berger v. United States*, 295 U.S. 78 (1935), Petitioner sought only the protection of Tennessee state law in support of this claim in his direct appeal petition. *See* Pet'r's Appeal Br. at 21-22. As the state courts had no notice of any perceived federal constitutional deprivation, this claim is not preserved for habeas review.

[17] As Petitioner cited only a single state court decision in support of this claim in his direct appeal brief, *see* Pet'r's Appeal Br. at 23, he has defaulted upon any federal basis for this claim.

[18] In support of this claim in his direct appeal brief, Petitioner cited only a single state court decision. *See* Pet'r's Appeal Br. at 24-25. As the state courts could not have been aware of any possible federal constitutional basis for this claim, it is not preserved for habeas review.

expert about statements Petitioner allegedly made to other doctors);[19]

paragraph 72 (claiming that the trial court should have dismissed the indictment for felony murder because it was facially insufficient);[20]

paragraph 74 (claiming that the trial court erred in not granting a mistrial when the jurors obtained access to newspapers during the trial);[21]

paragraph 75 (claiming that the trial court erred in permitting the prosecution to call certain rebuttal witnesses);[22]

paragraph 76 (claiming the trial court erred when it did not strike the testimony of witnesses

[19] Petitioner cited *Berger v. United States*, 295 U.S. 78 (1935), in support of this claim in his direct appeal brief. As *Berger* arose in the context of a federal prosecution and the Supreme Court failed to state any constitutional basis for its finding of prosecutorial misconduct there, the Court finds that the *Berger* Court relied there upon its supervisory powers rather than the Federal Constitution. Because Petitioner failed to give any other hint of his intention to rely upon the Federal constitution for protection, this claim is net preserved for habeas review.

[20] Although he raised a claim based upon similar facts in his direct appeal, *see* Pet'r's Appeal Br. at 30-34, he failed to claim the protection of any federal constitutional provision. Any constitutional claim was therefore not exhausted for habeas purposes.

[21] As Petitioner claimed only the protection of state law in his argument of this claim in his direct appeal brief, *see* Pet'r's Appeal Br. at 44-46, it is not preserved for habeas review.

[22] Petitioner only claimed the support of Tennessee state law in his argument for this claim in his direct appeal brief. *See* Pet'r's Appeal Br. at 49. Any federal claim upon these facts is therefore not preserved for habeas review.

for whom the prosecution had failed to produce requested statements);[23]

paragraph 78 (claiming the trial court erred in not granting a directed verdict as to the charge of assault with intent to commit murder upon Herschel Dalton);[24]

paragraph 84 (claiming that the testimony of Mr. Dice deprived Petitioner of various constitutional rights) and

paragraph 85 (claiming that the cumulative effect of these errors deprived Petitioner of due process).

Petitioner also presents some claims that, although presented to a Tennessee trial court in a post-conviction proceeding, were not presented to the appellate courts. In order to satisfy the exhaustion requirement, a petitioner must appeal the denial of a claim to the highest available state court. As Petitioner now has no state forum in which to present these claims, they are barred from review in a federal court for the same reasons as those claims never presented to the state courts at all. These claims are those presented in paragraph 45(a)-(d) and allege several deficiencies with the appellate review of Petitioner's conviction and sentence. The Court DISMISSES these claims.

[23] As Petitioner claimed only the support of Tennessee law and procedure in support of this claim in his direct appeal brief, *see* Pet'r's Appeal Br. at 52-54, any federal basis for this claim is defaulted.

[24] In his direct appeal brief, Petitioner contended only that this alleged error violated state law. *See* Pet'r's Appeal Br. at 56-57. Any federal basis for this claim is therefore defaulted.

B. Preserved Claims.

Eight of Petitioner's claims are properly before the Court. The Court will address the claims raised in the following paragraphs of Petitioner's petition.

paragraph 42(b) (claiming that there was insufficient evidence to support the aggravating circumstance that Cone endangered the lives of two or more people not the victims of his murder);

paragraph 42(d) (claiming that there was insufficient evidence to support the finding of the aggravating factor that Petitioner committed the murders for the purpose of evading arrest);[25]

paragraph 44 (claiming that there was insufficient evidence to convict Petitioner of first degree murder);

paragraph 56 (claiming that prosecution experts improperly discussed involuntary statements of Petitioner and that the trial court improperly characterized these experts as its own);

paragraph 73 (claiming that the trial court erred in denying Petitioner individual voir dire of potential jurors);

paragraph 79 (claiming that the trial court erred in not granting Petitioner's motion for dismissal because of selective prosecution);

[25] It is not apparent to the Court that Petitioner in fact exhausted this claim. A claim upon similar facts is asserted in his direct appeal brief, *see* Pet'r's Appeal Br. at 19-20, but it fails to assert any federal constitutional protection. Respondent, however, has not asserted a procedural default. Although the Court cannot grant relief upon an unexhausted claim, *see* 28 U.S.C. § 2254(b)(1)(A), it can deny such a claim and so addresses this issue on its merits.

paragraph 80 (claiming that Tennessee's death penalty is implemented upon an unconstitutional standard);

paragraph 81 (claiming that the death penalty in Tennessee is imposed in an arbitrary and discriminatory manner); and

paragraph 82 (claiming that the use of the death penalty in Tennessee lacks justification).

1) The aggravating circumstance of endangering the lives of two or more people not the victims of Petitioner's murders.

At trial, the jury found the existence of three aggravating circumstances, including that Petitioner "knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during his act of murder." TENN. CODE ANN. § 39-2-203(i)(3) (1982) (repealed). The Supreme Court of Tennessee, however, held that Tennessee's death penalty statute did not contemplate an extended criminal episode of the type engaged in by Petitioner, and that this finding was therefore not supported by the evidence. *See State v. Cone*, 665 S.W.2d 87, 95 (Tenn. 1984). The court noted, however, that the jury had found the presence of two other statutory aggravating circumstances: 1) that the crimes were especially heinous, atrocious, or cruel; and 2) that the murders were committed for the purpose of evading lawful arrest. *See id.* at 94-95. The court also found that there was more than ample evidence to support a finding that Petitioner had committed the murders in the course of a burglary, which is another statutory aggravating circumstance. *See id.* at 94. Holding the jury's erroneously found aggravating circumstance harmless beyond a reasonable doubt, the

court denied Petitioner a new sentencing hearing and affirmed the sentence of death. *See id.* at 95.

The analysis performed by the Supreme Court of Tennessee was not constitutionally infirm. When an aggravating circumstance is found invalid for some reason, harmless error analysis by a state appellate court is a proper remedy. *See Richmond v. Lewis*, 506 U.S. 40, 48-49 (1992) ("'[O]nly constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.' Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand." (quoting *Stringer v. Black*, 503 U.S. 222, 232 (1992) (citations omitted)). The adjudication of the Tennessee Supreme Court resulted in a decision neither contrary to federal law, nor involved an unreasonable application of federal law, nor was based on an unreasonable determination of the facts. This Court will therefore not disturb its decision, and the claim raised in paragraph 42(b) is DISMISSED.

2) The aggravating circumstance that the murder was committed for the purpose of avoiding lawful arrest.

At trial, the jury found that Petitioner had murdered the Todds for the purpose of preventing a lawful arrest or prosecution, a statutory aggravating circumstance. *See* TENN. CODE ANN. § 39-2-203(i)(6) (1982) (repealed). Upholding the finding of this aggravator upon appellate review, the Tennessee Supreme Court found that "[t]his circumstance was established not only by the testimony of

police officers but by [Petitioner's] own statement to his expert witnesses." *State v. Cone*, 665 S.W.2d 87, 95 (Tenn. 1984).

When reviewing a claim in a habeas petition contesting the sufficiency of the evidence supporting a finding adverse to a criminal defendant, a federal court must view the evidence in the light most favorable to the prosecution. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). There was more than ample evidence to support the jury's finding in the record. The day before entering the home of the Todds, his elderly victims, Petitioner had committed a robbery and fled from the police. *See* R. 999-1003, 1027-44. At the Todd home, Petitioner altered his appearance and called a family member before fleeing the state. *See* R. 1395, 1569-70. Both victims were found with wounds indicating that they had attempted to defend themselves from Petitioner. *See* R. 1295, 1298-99. Petitioner also told one of his expert witnesses that he was at the Todds' house for the purpose of preparing himself for flight. *See* R. 1680-81. As there is sufficient evidence from which a rational trier of fact could determine beyond a reasonable doubt that Petitioner killed the Todds in order to avoid arrest, the Court DISMISSES this claim.

3) Sufficiency of the evidence to support a conviction of first degree murder.

This claim is without merit. As the Tennessee Supreme Court noted, Petitioner has not denied committing the acts of which he is accused; instead, he asserted that he lacked the mental capacity to be responsible for these actions. *See State v. Cone*, 665 S.W.2d 87, 91 (Tenn. 1984). The jury, however, did not agree.

Even had Petitioner denied killing the Todds, there was an overwhelming amount of evidence presented at trial supporting his guilt. Both of the Todds died of multiple blunt trauma wounds consistent with repeated blows with a gun. *See* R. 1300-01. There was hair found in the Todds' house that matched Petitioner's, *see* R. 1588, and there was evidence that he had called his wife from the Todds'. *See* R. 1569-70. There were also fingerprints found matching Petitioner's at the Todds' home. *See* R. 1596. The finding by the Tennessee Supreme Court that there was sufficient evidence to convict Petitioner of first degree murder is not contrary to federal law, does not involve an unreasonable application of federal law, and is not based on an unreasonable determination of the facts. This claim is DISMISSED.

4) Prosecution experts discussed involuntary statements of Petitioner and these experts were improperly characterized as being "the court's" experts.

Petitioner objects that the testimony of two psychiatric experts at trial, Dr. John Hutson and Dr. Ben Bursten, violated Petitioner's Fifth and Sixth Amendment rights. He alleges that they testified about statements of Petitioner that were involuntary and improperly gained by the prosecution. The Tennessee Supreme Court denied this claim, finding that neither doctor testified about any incriminating statements made by Petitioner. *See State v. Cone*, 665 S.W.2d 87, 93 (1984).

Petitioner's claim is without merit. He relies upon *United States v. Leonard*, 609 F.2d 1163 (5th Cir. 1980), for this claim. In *Leonard*, the Fifth Circuit found that "facts related in a psychiatric examination should not be

admissible on the issue of guilt and that the only purpose for which the statements can be admitted is to determine the issue of sanity." *Id.* at 1166. Neither his state court briefs nor his filings in this Court have specified which statements fall afoul of this rule. The Court's own review of the transcript reveals only passing references to Petitioner's drug use and service in Vietnam by these experts. *See* R. 1955-56, 1981-83. As this drug use was a central consideration of the case in relation to Petitioner's defense of amphetamine psychosis, it was relevant to the issue of his sanity that he had put at issue and thus properly admitted. There is no indication that any involuntary or impermissibly gained statements were introduced at trial through the use of these experts.

Petitioner also contends that the trial court characterized these experts as "the court's," and that this characterization deprived him of federal constitutional rights. The record reveals, however, that these experts only stated that they examined Petitioner pursuant to court order. *See* R. 1954, 1959. There was no impermissible bolstering of these experts by either the prosecution or the trial court. This claim is therefore DISMISSED.

5) Denial of individual voir dire of the venire.

Petitioner alleges that the trial judge's denial of individual voir dire, particularly of Floreine Dragon, deprived him of constitutional rights. Petitioner apparently believed that Ms. Dragon had an illness that might have been relevant to her service on his jury and that she might have been reluctant to speak about this illness in front of the venire. In addressing this claim, the Tennessee Supreme Court found that the trial judge acted within his

discretion in denying individual voir dire, and that Ms. Dragon's service as a juror revealed no limitation on her ability. *See State v. Cone*, 665 S.W.2d 87, 92 (Tenn. 1984).

"Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges." *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991). The Due Process Clause has never been extended, however, to require a judge to ask every question submitted by counsel to assist in their use of peremptory challenges, which is what Petitioner requests in claiming a constitutional right to examine potential jurors about their health. As there can be no contention that the trial court's failure to ask Petitioner's proposed questions resulted in a fundamentally unfair trial, this claim is not a basis for habeas relief. *See id.* at 425-26.

6) Denial of Petitioner's motion alleging selective prosecution.

Petitioner contends that the prosecution's failure to offer him a plea bargain for a penalty less than death violated his Due Process rights. In support of this claim at trial, Petitioner sought to show that Tennessee's Attorney General had offered terms of life imprisonment to other accused murderers. The Supreme Court of Tennessee disposed of this claim without discussion. *See State v. Cone*, 665 S.W.2d 87, 94 (1984).

Even assuming that defendants accused of crimes similar to Petitioner's had been offered life sentences in exchange for pleas of guilty, Petitioner has no claim. State officials may exercise almost unfettered discretion in determining when to seek the death penalty. As long as a

decision is not based upon an impermissible factor such as race or religion, it is allowed. *See McClesky v. Kemp*, 481 U.S. 279, 311-12 (1987). Petitioner's argument at trial noticeably lacked indication of any evidence of such motivation by the Attorney General or any other prosecutor. Additionally, there is no constitutional right to plea bargain. *See Weatherford v. Bursey*, 429 U.S. 545, 560-61 (1977). This claim is DISMISSED.

7) Tennessee's death penalty statute is based upon an unconstitutional standard and imposed in an arbitrary and capricious manner.

In partial support of this claim, Petitioner has submitted statistics demonstrating various disparities in Tennessee's death sentences. Among other things, he alleges that urban juries return death sentences more than rural ones, that the indigent receive the death penalty more than the well-off, and that defendants in central Tennessee receive the death penalty less often than those in the eastern or western parts of the state. Even if all these statistics are accurate, Petitioner has failed to demonstrate the existence of any constitutional problem infecting his sentence. Without that showing, Petitioner's statistics alone cannot make out a claim of constitutional deprivation. *See McClesky*, 481 U.S. at 319.

Petitioner also suggests that the weighing of aggravating and mitigating factors in reaching a sentence in the death penalty statute under which he was sentenced was unconstitutional. He argues that, although the prosecution must show the existence of each aggravating factor beyond a reasonable doubt, it is not required to prove beyond a reasonable doubt that the aggravating factors outweigh any mitigating factors. He has not, however, brought any

case to the Court's attention supporting the proposition that this requirement is constitutionally mandated.

A death penalty statute must ensure that: 1) the class of criminal defendants which is eligible for the death penalty is genuinely narrowed; and 2) that the jury may make an individualized sentence determination and is not prevented from considering any relevant mitigating factors. *See Romano v. Oklahoma*, 512 U.S. 1, 6-7 (1994). The statute under which Petitioner was sentenced performed both these functions by requiring the state to prove the existence of at least one enumerated aggravating circumstance beyond a reasonable doubt and by permitting a jury to consider the existence of any evidence offered in mitigation by a defendant. *See* TENN. CODE ANN. § 39-2-203 (1982) (repealed). Tennessee's weighing process therefore satisfied constitutional requirements. The ruling of the Tennessee Supreme Court that the Constitution does not require a jury to find that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt is not contrary to clearly established federal law. *See Walton v. Arizona*, 497 U.S. 639, 650 (1990) ("So long as a State's method of allocating the burdens of proof does not lessen the State's burden . . . to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency."). The Court therefore DISMISSES this claim.

8) Tennessee's death penalty lacks penological justification.

Petitioner's last claim is that the imposition of the death penalty in Tennessee lacks justification. Passages

from *Gregg v. Georgia*, 428 U.S. 153 (1976), upon which Petitioner relied in his direct appeal brief demonstrate the lack of merit in this claim. The *Gregg* Court noted that the determination of penological justification was a complex, factual inquiry that properly rested with legislatures, not the courts. *See Gregg*, 428 U.S. at 186. The Court only requires the state to demonstrate that it has engaged in this inquiry by narrowing the types of crimes for which someone may be sentenced to death. *See id.* Tennessee did this by only permitting the imposition of the death penalty for murders committed with specific aggravating factors. As Petitioner presented no evidence to the state courts in support of this claim that would have overcome the strong presumption of validity accompanying a legislature's choice of punishment for a crime, this claim was properly denied.

Accordingly, all of Petitioner's claims are either defaulted or without merit, and the Court DISMISSES the petition.

C. Certificate of Appealability.

Pursuant to 28 U.S.C. § 2253(c)(1)(A) (1998), "an appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court" unless the petitioner obtains a certificate of appealability. Pursuant to § 2253(c)(2) (1998), a court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." While "obviously the petitioner need not show that he should prevail on the merits," the petitioner must nonetheless "demonstrate that the issues are debatable

among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to serve encouragement to proceed further.'" *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1953) (citation omitted). *See Lyons v. Ohio Adult Parole Auth.*, 105 F.3d 1063, 1069-73 (6th Cir. 1997) (partially overruled on other grounds) (holding that the district courts should apply the standards set forth in *Barefoot* when determining whether to issue a certificate of appealability).

In this case, there is no merit to any of Petitioner's claims. At oral argument, counsel for Petitioner urged the Court to issue a certificate of appealability so that the Sixth Circuit could resolve an apparent conflict between this Court's May 15, 1998 order and a decision of the Middle District of Tennessee in *Coe v. Bell* about the nature of procedural default in Tennessee post-conviction proceedings. Since that request, the Sixth Circuit has resolved any conflict in this area. *See Coe v. Bell*, ___ F.3d ___, 1998 WL 789087, *5 (6th Cir. Nov. 16, 1998). Accordingly, there remains no question of some substance about which reasonable jurists could differ. The Court, therefore, declines to issue a certificate of appealability.

The Court also must decide whether plaintiff is entitled to proceed in forma pauperis on appeal. Although the Sixth Circuit has concluded that the various filing fee payment requirements and good faith certifications of amended § 1915 do not apply to § 2254 cases, it has not resolved in a published opinion whether these requirements apply to § 2241 cases. *See Kincade v. Sparkman*, 117 F.3d 949, 951-52 (6th Cir. 1997); *cf. McGore v. Wrigglesworth*, 114 F.3d 601 (6th Cir. 1997) (instructing courts regarding proper PLRA procedures in prisoner civil-rights cases, without mentioning § 2241 petitions).

The Tenth Circuit, however, has held that the provisions of the PLRA do not apply to habeas uses of any sort or to § 2255 motions. *See McIntosh v. United States Parole Comm'n*, 115 F.3d 809, 810 (10th Cir. 1997); *United States v. Simmonds*, 111 F.3d 737, 743 (10th Cir. 1997). An unpublished Sixth Circuit opinion has adopted this approach in affirming a decision from this district. *See Graham v. U.S. Parole Comm'n*, No. 96-6725, 1997 WL 778515 (6th Cir. Dec. 8, 1997), *aff'g, Graham v. U.S.*, No. 96-3251-Tu (W.D. Tenn. Dec. 4, 1996). Because the Court finds the reasoning of *McIntosh* persuasive, and because the Court finds that this conclusion naturally follows from the Sixth Circuit's decision in *Kincade*, the Court concludes that the PLRA does not apply to § 2241 petitions.

Pursuant to *Kincade*, a petitioner must seek leave to proceed in forma pauperis from the district court under Fed. R. App. P. 24(a), which provides:

> A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit, showing, in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay fees and costs or to give security therefor, the party's belief that that party is entitled to redress, and a statement of the issues which that party intends to present on appeal.

The Rule further requires the district court to certify in writing whether the appeal is taken in good faith, and to deny the certificate if the appeal would be frivolous.

The good faith standard is an objective one. *See Coppedge v. United States*, 369 U.S. 438, 445 (1962). An appeal is not taken in good faith if the issue presented is

frivolous. *See id.* The same considerations that lead the Court to dismiss this petition as meritless also compel the conclusion that an appeal would be frivolous. It is therefore CERTIFIED, pursuant to Fed. R. App. P. 24(a), that any appeal in this matter by Petitioner is not taken in good faith, and he may not proceed on appeal in forma pauperis.

Conclusion

For the reasons stated, all of the claims raised in Petitioner's petition for a writ of habeas corpus are either barred or meritless, and the Court DISMISSES the petition. Additionally, the court DENIES a certificate of appealability, and CERTIFIES that any appeal taken in this matter is not taken in good faith. Finally, the Court LIFTS the stay of execution entered in this matter on March 7, 1997.

IT IS SO ORDERED this 29th day of January, 1999.

/s/ Jon Phipps McCalla
JON PHIPPS McCALLA
UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

For Publication
January 23, 1984

STATE OF TENNESSEE,	)	
Plaintiff-Appellee,	)	Shelby Criminal
vs.	)	S. Ct. No. 12
GARY BRADFORD CONE,	)	Hon. James C. Beasley, Judge
Defendant-Appellant.	)	

For Plaintiff-Appellee:	For Defendant-Appellant:
William M. Leech, Jr.	John C. Dice
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Gordon W. Smith	April Ferguson
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OPINION

(Filed Jan. 23, 1984)

AFFIRMED HARBISON, J.

Appellant was convicted of murder in the first degree and murder in the perpetration of a burglary in connection with the homicides of an elderly couple, Shipley O. Todd and his wife Cleopatra Todd, in Memphis on August 10, 1980. He was also convicted of three charges of assault with intent to commit murder in the first degree upon three other persons and of robbery by use of deadly force upon a fourth. All of these offenses were shown to have occurred on August 9, 1980.

We have reviewed the evidentiary record and the numerous issues presented on appeal by counsel for appellant. We find none of these issues sufficient to warrant reversal of any of the convictions, and all of them are affirmed.

Appellant was sentenced to life imprisonment for the armed robbery and for a term of years upon each of the assault charges. He was given the death penalty for each of the two murders. The record clearly warrants imposition of the death penalty under the circumstances of these homicides, and it could in no sense be deemed to be disproportionate, in our opinion.

The homicides were the climax of a series of criminal episodes commencing on August 9, 1980, when appellant robbed a jewelry store in Memphis of approximately $112,000 worth of expensive watches, rings and other jewelry. The manager of the jewelry store gave a description to the police, and an officer in an unmarked cruiser saw appellant driving his 1972 gray oldsmobile a short time after the robbery. He followed appellant at a normal speed, but the latter, apparently becoming alarmed, accelerated in an effort to escape. A high-speed chase ensued through mid-town Memphis and into a residential neighborhood. There appellant abandoned his automobile. He shot one of the police officers who attempted to arrest him, shot a citizen, John Clark, who challenged him, and drew a gun on a third citizen, demanding that the latter give appellant his automobile. The owner of the automobile fled, and appellant snapped his pistol several times, his ammunition having been exhausted. He not only threatened the owner of the automobile, but apparently was snapping his pistol at a police helicopter which was flying over the area to assist in his apprehension. Appellant eluded police

during the afternoon of August 9, a Saturday. Early on the next morning, in the same neighborhood, he appeared at the door of a resident, Lucille Tuech. When she refused him admittance to make a telephone call, he drew a pistol o . her. Later that afternoon he entered the home of Mr. and Mrs. Todd, which was located a very short distance from the apartment house where Ms. Tuech lived and in the same residential area where the other shootings had occurred.

Mr. Todd was 93 years of age; his wife was 79. She had gone to church on the morning of August 10 and had returned. Apparently she had eaten a meal. At some time in the afternoon appellant entered the home, breaking a latch on the rear door. The bodies of both victims were found horribly mutilated and cruelly beaten three days later upon investigation instituted by anxious relatives. Appellant's fingerprints and hair samples were found in the home, which had been ransacked, and he apparently was able to steal enough money or other valuables from the home to fly from Memphis to Florida, where he appeared at the home of an acquaintance on August 12.

Appellant from the beginning has admitted committing the homicides and the other crimes involved. The only defense interposed on his behalf was that of insanity, or lack of mental capacity, due to drug abuse and to stress arising out of his previous service in the Vietnamese war, some eleven years prior to the events involved in this case. This proved to be a tenuous defense, at best, since neither of the expert witnesses who testified on his behalf had ever seen or heard of him until a few weeks prior to the trial. Neither was a medical doctor or psychiatrist, and neither had purported to treat him as a patient. Their testimony that he lacked mental capacity was based

purely upon his personal recitation to them of his history of military service and drug abuse. A psychiatrist and a psychologist examined him upon orders of the trial court, and neither of them found any evidence of a stress syndrome or of excessive drug abuse. Lay witnesses who saw him at or about the time of the homicides contradicted his statements to his expert witnesses as to the degree and extent of his drug abuse. The jury was clearly warranted in finding that appellant was not insane at the time of the criminal episodes involved here on August 9 and August 10, 1980.

The jewelry store robbery was apparently planned well in advance. On August 8, 1980, appellant stole a Tennessee license plate from a Memphis resident. He apparently taped this over the Arkansas plate on the rear of his vehicle, but later it was found inside his automobile after he had removed it. He changed clothes after the robbery and was dressed in a different costume at the time of the subsequent police chase. After the murders he shaved his beard and altered his appearance considerably. He had capacity obviously to book plane flights from Memphis to Birmingham and thence to Florida. A lady acquaintance with whom he stayed in Florida and who had known him for several months prior to the crimes involved here testified that he had not used drugs excessively during the times when he was with her, nor did he appear to be experiencing withdrawal symptoms or using drugs when he returned to Florida on August 12, 1980. A police officer who examined him in Florida and took hair samples from his body said that there were no visible needle marks or other external evidences of drug abuse on appellant's body.

All of the items taken by appellant in the jewelry store robbery were found in his abandoned automobile, together with some $2,400 in cash and a very large quantity of contraband controlled substances.

We do not deem it necessary to dwell further upon the factual background of the case, because the evidence is overwhelmingly sufficient to sustain the convictions on all of the charges. Indeed, as previously stated, appellant has admitted guilt of all of them, but has denied responsibility solely on the basis of lack of mental capacity. It was stipulated that there was no issue of self-defense in connection with the deaths of the Todds, both of whom were repeatedly beaten about the head until they died. Defensive wounds appeared on the arms and hands of both of them, and the bodies had apparently been moved or dragged to points inside the house where they would not be visible from either the front or the rear door. Appellant made a telephone call from the residence of the Todds to his sister in Chicago at 3:45 on August 10, 1980. In addition he gave the following information to one of his expert witnesses in undertaking to explain the homicides:

> "He described that he was at their house with the agenda of getting cleaned up, getting fed, so that he could flee the area. And in the course of his time there they ceased to cooperate with him, and he started to try to control them physically to cooperate, and that's all the detail I have. He has no more recollection of specifics after that.
>
> "Q. But there's no question that he told you that he did kill those two old people?
>
> "A. That's what he told me, yes.

> "Q And they ceased to cooperate with him, is that what you said he told you. Right?
>
> "A. They became frightened, and that was not what he wanted them to do."

Other testimony indicated that the police had combed the area in which the Todds lived and in which the other shootings had occurred on Saturday afternoon, and that appellant had apparently concealed himself from them. They had even used tear gas on an abandoned residence in an effort to find him. There can be no question but that his killing of the Todds was in furtherance of his effort to escape from the crimes which he had committed on the previous day.

Appellant was thirty-three years of age. He was an honor graduate of the University of Arkansas and shortly before the events in question here had been accepted for admission into law school, scoring in the ninety-sixth percentile on a law school admission test. He had served in the armed forces from 1966 through 1969, and had one year's service in Viet Nam as a supply sergeant. He had received a bronze star for his service there and had been honorably discharged from the army. He went to college after his discharge. In 1972, however, after graduating from college, he was convicted of three separate armed robberies in Oklahoma, these covering a period from December 1971 through May 1972. He had been imprisoned in Oklahoma until the latter part of 1979. He had then returned briefly to his home in Arkansas and had gone to Hawaii for a time. The vehicle which he was driving on August 9, 1980 had originally been registered in his name, but was registered in the name of his mother on that date.

Appellant offered the testimony of two witnesses in support of his defense of lack of mental competence.[1] The first of these was Dr. Matthew Jaremko, a clinical psychologist at the University of Mississippi. He had interviewed appellant on two occasions for a total of about six hours, beginning in February 1982, less than two months prior to the trial. It was the opinion of Dr. Jaremko that appellant was suffering from post-traumatic stress disorder as a result of his experiences in Viet Nam, and that upon this was superimposed a serious drug-abuse disorder. Dr. Jonathan Lipman, a neuro-pharmacologist, testified that appellant, in his opinion, suffered from "chronic amphetamine psychosis" as a result of serious drug abuse. As previously stated, neither of these witnesses had ever known or treated appellant prior to the early part of 1982, and both of them based their testimony entirely upon what he told them as to the extent of his ingestion or injection of drugs. Not only was the weight of their testimony a question for the jury, but appellant's known pattern of conduct immediately before and immediately after the events in question here raised serious doubts as to the accuracy of their opinions, because he did not appear to be seriously under the influence of or experiencing withdrawal from drugs according to the testimony of several witnesses who saw him during August 1980. In addition, as previously pointed out, the State offered two witnesses whose qualifications equalled or exceeded those of appellant's experts, and neither of the State's expert witnesses found any basis for an insanity defense.

[1] Other than claiming his constitutional right to remain silent, appellant did not testify at either the guilt or the sentencing phase of the trial.

Counsel for appellant, who conducted the defense and has pursued the appeal in this case most diligently, has raised numerous issues for our consideration. After carefully considering them, however, we are of the opinion that none of them warrant our interference with the jury verdict and the judgment of the trial court rendered thereon. In addition to overruling the issues presented as to the sufficiency of the evidence, we will comment briefly upon the other issues raised on appeal, although not necessarily in the order presented in the briefs.

Appellant has assigned error upon the failure of the trial court to grant individual *voir dire* of a juror, Floreine C. Dragon. This juror indicated that she was taking some medication at the time of the trial. Defense counsel requested that the other prospective jurors be sequestered so that he could examine the juror individually and avoid embarrassing her. The trial court denied this request, and we are of the opinion that this ruling was within his discretion. There was nothing necessarily embarrassing in questioning the juror about her medication as a part of the group. She apparently served on the jury without difficulty or incident. At one point during the trial she was questioned privately, as were other jurors, concerning some newspaper materials which had been furnished to the jury during a weekend recess. Nothing in her testimony at that time or in any post-trial affidavit indicates that she was not competent to serve as a juror or that appellant was prejudiced in any way by the ruling of the trial judge with respect to her *voir dire* examination.

Error is also assigned on the *voir dire* examination of five other persons who were excused by the trial judge for cause when they expressed irrevocable and unconditional refusal to consider the imposition of the death penalty. We

have reviewed carefully the examination of each of these prospective jurors, and in our opinion the trial judge acted properly in excusing them. *See Houston v. State,* 593 S.W.2d 267, 272 (Tenn. 1980).

During a weekend recess of the lengthy trial, a court officer furnished members of the jury with a Sunday newspaper. He had clipped from this all news stories which he observed concerning the trial and its incidents. However, in the sports section, there was a story about one of the witnesses who had been shot by appellant on August 9, 1980. In a magazine story there was also a brief reference to a double murder of an elderly couple in mid-town Memphis. This was merely a passing reference which did not refer to the names of the victims or of appellant.

The trial judge conducted an individual examination of the jurors on their exposure to the magazine article. Only one juror had even read that article, and none of the jurors had read anything in the newspaper which they associated in any way with the case on trial. They were not separately examined about the article on the sports page, but apparently none of them had taken note of it or were affected by it in any way. In all events, that article simply recounted the testimony of a witness, John Douglas Clark, who had testified on the previous Friday. It contained nothing with which the jurors were not already fully familiar. We find no error in connection with the ruling of the trial judge and agree that a mistrial was not justified upon the basis of these news items.

A number of issues are presented concerning rulings made by the trial judge during the course of the trial. One of these involved an objection by counsel for appellant to the cross-examination of Dr. Lipman. That witness testified that

all he knew about appellant's history was what appellant had told him. He admitted on cross-examination that if appellant had given different information to other doctors, this might affect his opinion. Apparently appellant did give other information to the State's expert witnesses, or they obtained other information independently, because their opinions differed greatly from that expressed by Dr. Lipman. The cross-examination was properly permitted. Further, the trial judge properly allowed the expert witnesses called by the State to testify concerning statements made to them by the accused with reference to his use of drugs. Neither witness quoted any incriminating statements by appellant, insofar as the facts of the case were concerned. At two points in the record references were made to the fact that these witnesses had examined appellant upon orders of the court. We find no statement, however, that they were "the Court's doctors," as alleged in the brief of appellant. The issue is without merit.

Equally without merit is the contention that the trial judge permitted three witnesses to testify for the State on rebuttal. It was insisted by appellant that these witnesses should have been offered during the State's presentation in chief. All of them, however, directly and sharply contradicted the contention of appellant that he was "out of his mind" as a result of drug abuse on the weekend in question, and that he was experiencing severe and extreme symptoms of drug withdrawal after the crimes for which he was on trial.

Error is assigned upon the admission of photographs of the homicide victims. The trial judge excluded all photographs which showed the facial features of the two deceased persons in any detail. The photographs which were admitted simply showed portions of the house, and in

some of them the bodies of the victims could be seen, but none of the photographs was gruesome nor did the prejudicial effect of any outweigh its probative value.

Counsel for appellant insists that the prosecuting attorney made an improper reference to a motion *in limine* which had been ruled upon by the trial judge. That motion involved some of the photographs just discussed. When counsel for the prosecution reached the point in trial when he wished to introduce photographs of the Todd residence, he mentioned to the court that he was coming to material which had been the subject of the pre-trial motion. At that point the judge excused the jury. The conduct of counsel for the prosecution was entirely proper. There was no attempt to suggest to the jury what the subject of the pre-trial motion had been or the ruling of the court thereon. The assignment is overruled.

There are numerous other assignments in which counsel for appellant insists that the prosecuting attorneys were guilty of improper conduct in the presence of the jury. We have examined each of these, and find none of them to warrant reversal. One improper remark was made, as to which the trial judge offered to give curative instructions to the jury. Counsel for appellant declined these. In our opinion no remarks made during the course of the trial concerning counsel for either side could possibly have affected the results. The same is true with respect to alleged improper argument by counsel for the State. One or two brief comments were made in the heat of argument which probably should not have been made, but these either were not objected to at the time or were legitimate inferences to be drawn from the proof. We accordingly overrule issues two, three and six as presented in appellant's brief.

We find no merit to the assertion by appellant that the indictments in this case were insufficient and find no error with respect to the jury instructions. Likewise we find without merit the insistence that the State failed properly to produce witness statements for use by counsel for appellant on cross-examination. The State produced all of the statements which it had. The reference by counsel for appellant simply has to do with some summaries of witness interviews made in a general police report. There is no showing that any of the witnesses referred to ever saw or adopted any of the materials contained in this report. Issues seven, fourteen and fifteen are overruled.

We find no substance to the contention that the State was guilty of improper or selective prosecution in this case by not offering a life sentence to the accused in pretrial negotiations. We also overrule four issues addressed to the alleged invalidity of the death penalty in this state. All of these contentions have been considered in depth by this Court in numerous reported decisions, and they do not warrant further discussion here. *See generally State v. Austin*, 618 S.W.2d 738 (Tenn. 1981); *State v. Pritchett*, 621 S.W.2d 127 (Tenn. 1981); *Houston v. State*, 593 S.W.2d 267, (Tenn. 1980).

The final issue presented by appellant is whether a new sentencing hearing is justified because of insufficiency of the evidence to support one of the aggravating circumstances found by the jury. After careful consideration we are of the opinion that if any error was committed by the jury, it was harmless beyond a reasonable doubt in view of multiple aggravating circumstances which were clearly established.

In the guilt phase of the case the jury found that appellant was guilty of murder in the first degree as a matter of common law and also of felony-murder in the perpetration of burglary. The latter, in itself, is one of the statutory aggravating circumstances warranting the death penalty. T.C.A. § 39-2-203(i)(7). In reporting aggravating circumstances at the end of the sentencing hearing, however, the jury did not repeat this particular circumstance although it is abundantly established by the evidence. The jury did find, however, three other aggravating circumstances which were clearly shown by the evidence. The first of these was that the accused had previously been convicted of one or more felonies involving the use or threat of violence to the person. T.C.A. § 39-2-203(i)(2). As mentioned previously, it was proved that appellant had been convicted of three separate armed robberies in Oklahoma in 1982.

The jury also found that the murders in question were especially heinous, atrocious, or cruel in that they involved torture or depravity of mind as provided in T.C.A. § 39-2-203(i)(5). The evidence abundantly established that both of the elderly victims had been brutally beaten to death by multiple crushing blows to the skulls. Blood was spattered throughout the house, and both victims apparently had attempted to resist, because numerous defensive wounds were found on their persons. The only excuse offered in the entire record for this unspeakably brutal conduct by the accused was that these elderly victims had at some point ceased to "cooperate" with him in his ransacking of their home and in his effort to flee from arrest. As previously stated, it was stipulated by counsel for appellant that there was no issue of self-defense even remotely suggested. The deaths of the victims were not instantaneous, and

obviously one had to be killed before the other. The terror, fright and horror that these elderly helpless citizens must have endured was certainly something that the jury could have taken into account in finding this aggravating circumstance.

The jury also found that the accused committed the murders for the purpose of preventing a lawful arrest or prosecution, an aggravating circumstance specified in T.C.A. § 39-2-203(i)(6). This circumstance was established not only by the testimony of police officers but by appellant's own statement to his expert witnesses.

It thus appears that four aggravating circumstances were indisputably established by the record, and three of these were reported by the jury at the end of the sentencing hearing. The jury also reported another aggravating circumstance, T.C.A. § 39-2-203(i)(3) as follows:

> "The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during his act of murder. . . ."

It is clear from the record that on the afternoon of August 9, 1980, the accused shot two persons and attempted to shoot a third in escaping from an armed robbery after a high-speed automobile chase. On the next morning he terrorized Ms. Teuch and some hours later killed Mr. and Mrs. Todd. There is considerable logic and plausibility to the finding of the jury that the acts of murder were committed during the course of an attempted escape from this crime spree, and certainly more than two persons were in danger.

We are of the opinion, however, that generally the statute does not contemplate an extended criminal episode,

but contemplates either multiple murders or threats to several persons at or shortly prior to or shortly after an act of murder upon which the prosecution is based.[2] We are therefore doubtful that the record in the present case sustains the jury verdict as to this aggravating circumstance. Nevertheless, where three others were clearly found by the jury and the record demonstrates a fourth, we are of the opinion that the jury finding with respect to this aggravating circumstance, if erroneous, was harmless beyond a reasonable doubt and does not warrant the granting of a new sentencing hearing. In this respect, the case differs markedly from *State v. Pritchett,* 621 S.W.2d 127 (Tenn. 1981), in which there were only two aggravating circumstances found and the evidence did not support one of these. In the recent case of *State v. Workman,* ___ S.W.2d ___ (Tenn. 1984), the Court upheld a death sentence where there was some question as to one of the aggravating circumstances found by the jury. The Court found that the validity of the sentence would not be affected even if the jury had erred as to one circumstance where numerous others were clearly established.

Pursuant to T.C.A. § 39-2-205 we have reviewed the sentence of death in this case and are of the opinion that it is not in any way disproportionate under all of the circumstances, including the brutal murders of two elderly defenseless persons by an escaping armed robber who had

[2] There could be situations where substantial periods of time might be involved, such as in the taking of hostages or the hijacking of a plane or other vehicle. It is unnecessary here to attempt to define all possible fact situations which might be covered by this statute. It was held applicable in *State v. Workman,* ___ S.W.2d ___ (Tenn. 1984) where an escaping robber killed one police officer and fired at two others.

terrorized a residential neighborhood for twenty-four hours.

The judgment and sentence are affirmed at the cost of appellant. Unless otherwise ordered by this Court or other proper authority, the sentence will be carried out as provided by law on June 29, 1984.

Justice Brock concurs in affirming the conviction in this case but dissents with respect to the imposition of the death penalty for reasons stated in his dissenting opinion in *State v. Dicks,* 615 S.W.2d 126, 132 (Tenn. 1981).

/s/ William J. Harbison
William J. Harbison, Justice

FONES, C.J., and COOPER and DROWOTA, JJ., concur.
BROCK, J., partial dissent.

IN THE COURT OF
CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEPTEMBER 1987

GARY BRADFORD CONE, APPELLANT	)	No. 79
	)	
VS:	)	Shelby Criminal
	)	Honorable Arthur
STATE OF TENNESSEE, APPELLEE	)	T. Bennett, Judge
	)	
	)	(Post Conviction Relief)

FOR THE APPELLANT:	FOR THE APPELLEE:
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AFFIRMED

(Filed Nov. 4, 1987)

LLOYD TATUM, SPECIAL JUDGE

OPINION RELEASED: NOV 4 1987

OPINION

This is an appeal by Gary Bradford Cone from a judgment denying post conviction relief. The appellant was convicted of first-degree murder and the death penalty was imposed. He was also found guilty of several other offenses. On direct appeal, the Supreme Court of Tennessee affirmed the conviction. *State v. Cone,* 665 S.W.2d 87 (1984). The opinion of the Supreme Court summarizes the facts and we will not repeat them here except insofar as is necessary to discuss the issues presented.

The first issue presented is:

> "The improper final arguments of both prosecutors for the State at the conclusion of the trial to determine guilt or innocence affected the verdict of the jury to the prejudice of the defendant."

The appellant was convicted of beating an elderly couple to death on August 10, 1980. He was given the death penalty for each of the two murders.

On August 9, 1980, the appellant robbed a jewelry store in Memphis. In a high-speed chase after the jewelry store robbery, the appellant abandoned his automobile. In the automobile there was found a great quantity of assorted drugs. The list of these drugs is composed of four pages in the transcript of the original trial.

Officers also found the sum of $2,459.94 in the appellant's abandoned automobile. At the time of the trial, the appellant was under indictment for the robbery of a Big Star grocery store from which $1,893.72 was taken. The Big Star robbery also occurred on the day before the murder of the two elderly people. The record does not

reveal the source of the rest of the money that was found in the abandoned automobile ($566.22).

It might be said that the proof that the appellant killed these two victims is conclusive. At trial, the appellant admitted committing these homicides and the other crimes involved.

The only defense interposed by him was that of insanity, or lack of mental capacity, due to drug abuse (chronic amphetamine psychosis) and to stress arising out of his previous service in the Vietnamese War (Vietnam Veteran Stress Syndrome). Hence, it was his theory that he was a drug addict. It was the prosecution's theory that the appellant was not a drug addict.

The following occurred during the opening argument by the State at the guilt phase of the trial:

> "GENERAL PATTERSON: Has an automobile that – I've got a '73 automobile. How does he do all this? I'm not trying to be absurd, but he says he's a drug addict. *I say balony.* (sic) *He's a drug seller.* Doesn't the proof show that? Well, let's see what we found in this car – (emphasis added)
>
> MR. DICE: I want to object, if Your Honor please, for the record.
>
> GENERAL PATTERSON: Let's see what –
>
> THE COURT: Excuse me.
>
> MR. DICE: Not indicted. Not charged. Not one piece of evidence.
>
> THE COURT: Yes, I'm going to sustain the objection to any argument along the line of drug selling, General. I think that's improper argument.

> GENERAL PATTERSON: For a point of clarification, I can argue an inference from the fact, can't I?
>
> THE COURT: Yes, but you can't argue the inference from the fact that someone has been violating the law by selling drugs, I think, General. So, I'm going to have to sustain the objection to that."

After the State's opening argument, defense counsel argued the defense theory that the appellant was insane due to drug abuse. There was also argument by the defense concerning the appellant's indigency. In response, the State argued as follows:

> "GENERAL STROTHER: The last time that I heard anything about his client, his client had over $2,000 cash on him. His client had flown to Hawaii. His client was living in Key West. His client had bought a motorcycle. His client had an automobile. That's just lawyer talk, that indigency business.
>
> He say, (sic) well, the State shows no evidence. Where are the indictments? Where are the charges for drug sales? There aren't any charges for drug sales, but that doesn't mean that you can't look and question in deciding whether or not this man was, in fact, a drug user, or why he had those drugs. Did he just have those drugs, or did he have those drugs and thousands of dollars in that car? Among those drugs are there only the drugs he used? How do we know if he used drugs? The only thing that we ever had that he used drugs, period, is the fact that those drugs were in the car and what he told people. What he told people. But according to even what he told people, there are drugs in there he didn't even

> use. A whole page of drugs. Barbiturates that he didn't even use. Why would those be there? Why would he have those in there? Why? *Common sense, and a reasonable answer to that? Same place that $2,000 came from.*" (Emphasis added)

The above-quoted argument by the State is the basis of the complaint of prosecutorial misconduct. The appellant says that the prosecuting attorneys knew, or should have known, that most of the money found in the appellant's abandoned vehicle came from a robbery that occurred on August 9, and not from the sale of drugs. At the post-conviction hearing, one of the prosecuting attorneys testified that he was aware of the indictment for the Big Star robbery but had not familiarized himself with the details because the District Attorney's office had no intention of prosecuting that case. The trial court held that the reference to the money was not made with an improper intent.

The test for alleged improper prosecutorial misconduct is, "whether the improper conduct could have affected the verdict to the prejudice by the defendant." *Judge v. State,* 539 S.W.2d 340, 344 (Tenn.Crim.App. 1976). The great quantity of assorted drugs found in the appellant's abandoned automobile supplied a strong inference that the drugs were possessed for resale. *State v. Dowell,* 705 S.W.2d 138 (Tenn.Crim.App. 1985); *Wells v. State,* 509 S.W.2d 520 (Tenn.Crim.App. 1973), *affm'd.* 517 S.W.2d 755. In view of the abundant other evidence that the appellant was a drug salesman, we find that the reference to the money was relatively insignificant, although it should have not been made. There was abundant evidence, not referred to in the above-quoted argument, that the

appellant was not a drug addict. We find beyond a reasonable doubt that the reference to the money did not affect the verdict of the jury in either the guilt or punishment stage of the trial.

In the second issue, the appellant asserts that trial counsel was ineffective. The appellant alleges that his trial attorney rendered ineffective assistance by (1) failing to interview the State's rebuttal witness, Ilene Blankman, prior to trial; (2) in failing to object to the improper argument of General Strother implying that the petitioner was a drug dealer; (3) inadequate cross-examining the State's expert witnesses; (4) failing to introduce mitigating evidence at the sentencing phase of the trial; and, (5) failing to make a final argument at the sentencing phase. We will discuss each of these contentions.

FAILURE TO INTERVIEW WITNESS

It is admitted that counsel failed to interview Ilene Blankman, a rebuttal witness for the State, prior to trial. Briefly, she testified that she was the appellant's girlfriend, that the appellant was not a drug addict and had no needle marks on his body. The trial court found that counsel knew Ms. Blankman was going to testify for the State. Defense counsel discussed this fact with the appellant and the appellant strongly insisted that defense counsel not talk with her. She was a former girlfriend and the appellant informed defense counsel in detail regarding his relationship with her. Defense counsel cross-examined her. There is no showing that her testimony would have been different had defense counsel talked with her before trial or that the failure to interview in any manner prejudiced the appellant. The trial court found that even if it

could be said that counsel's performance was deficient in this regard, such deficiency was not prejudicial and did not render the assistance of counsel ineffective. See *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984).

FAILURE TO OBJECT TO IMPROPER ARGUMENT

The appellant contends that his attorney failed to object to the above-quoted argument of General Strother at the guilt phase implying that the petitioner was a drug dealer. As above stated, the argument by the State was legitimate in context of this case; there was an issue as to whether the drugs found in the appellant's car were possessed by the appellant for his own use or his inventory as a drug dealer. Also as stated, the argument concerning the amount of money in the car might have been objectionable but was relatively insignificant. The trial attorney testified that he did not object to the argument because he did not want to reemphasize it to the jury. The trial court accredited defense counsel's testimony in this regard. Counsel's strategic decision not to object was a legitimate trial tactic, the exercise of which does not furnish a basis for finding counsel's representation deficient. See *State v. Martin,* 627 S.W.2d 139, 141 (Tenn.Crim.App. 1981). Moreover, the reference to the amount of money was relatively insignificant when considered with all of the other evidence above referred to. Hence, the failure to object did not prejudice the appellant. The Trial Court concluded that this tactic did not amount to ineffective assistance of counsel.

INADEQUATE CROSS-EXAMINATION OF EXPERT WITNESSES

The appellant contends that trial counsel failed to adequately cross-examine the State's expert witnesses on the insanity issue. This issue was not raised in the post conviction petition, nor was there any evidence on this issue at the post conviction hearing. An issue raised for the first time on appeal is waived. *Ellison v. State,* 549 S.W.2d 691, 694 (Tenn.Crim.App. 1976). Moreover, the record fails to support the petitioner's contention on appeal.

FAILURE TO INTRODUCE MITIGATING EVIDENCE

The appellant contends that counsel's representation was insufficient because he failed to introduce any mitigating evidence at the sentencing phase. The appellant stated that two medical experts who testified for the defense at the guilt phase of the trial should have been reintroduced to testify at the penalty phase as to the appellant's mental state at the time the crimes were committed. He also contends that his mother should have been reintroduced to testify concerning his early childhood.

The trial court accredited the testimony of the defense attorney during which he explained that this evidence had been presented during the guilt stage of the proceeding. Trial counsel was aware that the trial judge would instruct the jury that it should consider mitigating circumstances proved at the guilt stage of the trial. Defense counsel also testified that the appellant's mother did not make a good witness at the guilt stage of the trial and in his judgment,

the best tactic was to not subject her to further cross examination.

The appellant also complains because defense counsel did not introduce other relatives and associates to testify concerning his early childhood. Defense counsel testified that these potential witnesses were interviewed by him and that he concluded that there was a danger that cross examination would elicit additional criminal activity on the part of the appellant. There is nothing in the record to show that the testimony of these witnesses would have benefited the defense. In the absence of this showing, we will not presume that trial counsel erred in not calling them as witnesses. See *State v. Martin, supra.*

The appellant also states that his mother should have been called as a witness to enable her to make "a plea to the jury for her son's life." If the appellant means by this that the mother should have been permitted to make an emotional appeal or speech to the jury, this practice is not permitted in our system.

The appellant also argues that a letter written to the appellant by a member of the family of the victim should have been introduced at the penalty phase. One member of the victim's family, who wrote this letter, apparently forgave him for committing these offenses. We fail to see how a forgiving letter written by someone else would mitigate the appellant's guilt.

The appellant agreed that he would not testify at either stage of the trial. The appellant told his attorney that he could not control his anger toward the prosecuting attorneys. Defense counsel discussed at length on different occasions the question as to whether the appellant should testify and it was his informed decision not to testify.

FAILURE TO MAKE FINAL ARGUMENT AT THE SENTENCING PHASE

The appellant contends that counsel's performance was deficient because he failed to make a final argument pleading for the petitioner's life at the sentencing phase. The trial judge found that counsel deliberately waived final argument as a tactic.

One of the prosecuting attorneys made a low-key opening argument after the punishment hearing. It was trial counsel's judgment that he should waive argument to prevent the other prosecuting attorney from making closing argument. The other prosecutor was capable of making very devastating closing arguments and he could not be answered by defense counsel. This is a legitimate trial tactic, the exercise of which furnishes no basis for a finding of ineffective assistance. See *State v. Martin, supra.*

The question of what witnesses to use and whether to waive final argument are tactical questions upon which competent lawyers might disagree. It cannot be said that incompetent representation had occurred merely because other lawyers, judging from hindsight, might have made a better or different choice of tactics. *Hellard v. State,* 629 S.W.2d 4, 12 (Tenn. 1982); *Martin v. State, supra.*

The trial court found the factual issues in favor of the State and found that trial counsel was not ineffective. The Court's factual findings are binding on this court unless the evidence preponderates against them. *Graves v. State,* 512 S.W.2d 603, 604 (Tenn.Crim.App. 1973). The evidence does not preponderate against the trial court's findings.

Trial counsel made a diligent and thorough investigation of the facts and the law. Although the appellant was without funds, trial counsel was able to procure a defense team composed of himself, a research expert, medical experts, and an investigator. No stone was left unturned in the preparation of the appellant's defense. Trial counsel was very conscientious in representing the appellant and placed much thought and effort into the tactical aspects of this case. However, trial counsel's work and diligence could not remove the overwhelming evidence against the appellant, both on the factual issue and insanity issue. In our view, the findings of guilt and the imposition of the death penalty were based upon the facts and the law – not by shortcomings of counsel.

We agree with the trial judge that trial counsel met the standard required by *Baxter v. Rose,* 523 S.W.2d 930 (Tenn. 1975).

The judgment of the trial court is affirmed.

/s/ Lloyd Tatum
LLOYD TATUM, SPECIAL JUDGE

CONCUR:

/s/ Robert K. Dwyer
ROBERT K. DWYER, JUDGE

/s/ Jerry Scott
JERRY SCOTT, JUDGE

IN THE COURT OF
CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
JANUARY 1995 SESSION

GARY BRADFORD CONE, Appellant, V. STATE OF TENNESSEE, Appellee.	) C.C.A. No. 02C01-9403-CR-00052) Shelby County) Hon. William H. Williams, Judge) (Post-Conviction – Death Penalty)

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OPINION FILED: MAR 22 1995

AFFIRMED

PAUL G. SUMMERS,
Judge

OPINION

The appellant, Gary Bradford Cone, was convicted of murder and sentenced to death in 1982. After unsuccessfully appealing to the Tennessee Supreme Court, the appellant filed a petition for post-conviction relief. Appellant's first petition was denied, and this Court affirmed the denial. Appellant then filed a second petition, which was dismissed by the trial court. On appeal, this Court remanded the trial court's denial of the appellant's second post-conviction petition in order to give the appellant an opportunity to rebut the presumption of waiver arising from the previous post-conviction proceedings. Appellant filed a lengthy factual affidavit concerning waiver and, following oral argument on the waiver issue, the trial court found that all of the issues raised by the appellant's amended second petition were either previously determined or waived. Accordingly, the trial court dismissed the appellant's second petition. The appellant now appeals the trial court's denial of his second post-conviction petition, presenting for our review the related issues of whether the trial court's dismissal was either premature or incorrect. Having carefully considered both issues, we find them to be without merit and affirm the judgment of the trial court.

ANALYSIS

Appellant contends that the trial court's dismissal of his second petition was premature, because the state had not adequately responded to the petition as amended and because the trial court declined to hold an evidentiary

hearing.[1] The appellant's position on this issue is based on the Tennessee Supreme Court cases of *Swanson v. State,* 749 S.W.2d 731 (1988), and *Allen v. State,* 854 S.W.2d 873 (Tenn. 1993). In both *Swanson* and *Allen, pro se* post-conviction petitions were summarily dismissed upon the state's motion without appointment of counsel or an evidentiary hearing. The cases cited by the appellant are of limited relevance where, as here, the post-conviction petitioner had the benefit of appointed counsel to review and amend his original *pro se* petition. Furthermore, *Swanson* and *Allen* recognized that dismissal without an evidentiary hearing is proper where the petition fails to state a "colorable claim for relief," *Allen v. State,* 854 S.W.2d 873, 876, or where the claims in the petition are "conclusively incorrect." *Swanson v. State,* 749 S.W.2d 731, 736. Our conclusion as to the timeliness of the trial court's dismissal is therefore dependent on our resolution of the substantive issues of waiver and previous determination.

Grounds for relief which have been previously determined or waived are not cognizable in a post-conviction action. T.C.A. § 40-30-111 (1990). Tennessee Code Annotated Section 40-30-112 (1990) provides as follows:

> A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.

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[1] The appellant argues that in our previous opinion, *Cone v. State,* C.C.A. No. 48, 1991 WL 77535 (Tenn. Crim. App. May 15, 1991), we remanded to the trial court for an evidentiary hearing. In that opinion, we held only that the appellant was entitled to an opportunity to rebut the presumption of waiver. *Id.* We did not intend to require the trial court to conduct an evidentiary hearing.

> A ground for relief is "waived" if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.
>
> There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived.

The trial court, in memorandum findings of fact and conclusions of law, addressed the fifty-two separate grounds alleged by the appellant as a basis for post-conviction relief. Had Judge Williams not provided this Court with such an exemplary and meticulous treatment of the appellant's petition, our task in reviewing the relevant issues would have been difficult if not insurmountable.

In post-conviction proceedings, the petitioner has the burden of proving the allegations in his petition by a preponderance of the evidence. *McBee v. State,* 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). Furthermore, the findings of the trial court in post-conviction hearings are conclusive on appeal unless the evidence preponderates against the judgment. *State v. Buford,* 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983); *Clenny v. State,* 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978).

The trial court found that most of the appellant's stated grounds for relief, in addition to being repetitious and cumulative, were previously determined either on direct appeal or in the appellant's first petition. The trial court also noted that many of the appellant's "grounds" are merely conclusory allegations which fail to state a constitutional deprivation and are therefore not cognizable in a

post-conviction action.[2] Finally, the trial court found that the appellant had failed to rebut the presumption of waiver which would preclude the consideration of any new grounds raised in the appellant's petition.

The appellant's second petition contains the following blanket statement on the issue of waiver:

> The above claims were not raised previously either due to the law regarding the claim not being established at the time, ineffective assistance of counsel, the novelty of the claim or counsel's failure to apprise petitioner of the claim or its relevance to his case. Because of this, the petitioner himself has never had an opportunity before now to either raise these claims or waive them. Neither petitioner nor any person previously appointed to represent petitioner has knowingly and understandingly failed to raise any and all such claims earlier.

The appellant contends that this statement alone is sufficient to rebut the presumption of waiver and that the trial court's dismissal of his second petition was therefore incorrect.

As for the appellant's claim that some of the issues raised in his second petition were "novel" or that the law concerning some issues was uncertain, we find, as did the trial court, that the appellant has failed to present any support for this vague and conclusory statement. Furthermore, because the appellant did not address the issue of "new law" in his brief or on oral argument to this court,

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[2] Post-conviction relief will only be granted where a defendant's conviction or sentence is either void or voidable due to the abridgement of a constitutional right. T.C.A. § 40-30-105 (1990).

the issue is waived. *See* Tenn. Rules of Crim. App. Rule 10(b); T.R.A.P. Rule 27(a)(7); *State v. Chance,* 778 S.W.2d 457, 462 (Tenn. Crim. App. 1989).

In his first post-conviction petition, the appellant presented five factual allegations to support his constitutional claim of ineffective assistance of counsel. His second petition, on the other hand, listed thirty-five separate deficiencies in his trial counsel's performance. The trial court found that ineffective assistance of counsel is a single "ground for relief" as contemplated by the statute, *see* T.C.A. § 40-30-111, and that the issue of ineffective assistance of counsel was therefore previously determined. We agree with the trial court. A petitioner may not relitigate a previously determined issue by presenting additional factual allegations. We should not encourage post-conviction petitioners to invent new facts to revive an issue which was unfavorably decided, nor should we allow petitioners to "sandbag" by reserving factual claims until their second or third petition.

Finally, the appellant maintains that he did not waive any issues "knowingly and understandingly" as required by the statute. *See* T.C.A. § 40-30-112(b)(1). The trial court found that the appellant's mere statement that he did not understand the issues or appreciate the significance of them was insufficient, without further explanation, to rebut the presumption of waiver. Parenthetically, the trial court noted that the appellant was neither illiterate nor unsophisticated. In fact, the appellant graduated with honors from the University of Arkansas and had been accepted for admission into law school after scoring in the ninety-sixth percentile on his law school admission test.

We must agree with the trial court that the appellant should not be able to extend the post-conviction process and delay the administration of justice *ad infinitum* by filing subsequent petitions which disingenuously claim that the grounds asserted were unknown to the appellant when his previous petition was filed. As Justice Kennedy wrote for the United States Supreme Court in *McCleskey v. Zant,* 499 U.S. 467, 111 S.Ct. 1454 (1991), "[p]erpetual disrespect for the finality of convictions disparages the entire criminal justice system." *Id.* at 492, 1469. Our own Tennessee Supreme Court observed in 1972:

> There must be a finality to all litigation, criminal as well as civil. The courts, the executive branch of government, the legal profession, and the public have been seriously inconvenienced by the prosecutions of baseless *habeas corpus* and post-conviction proceedings. Defendants to criminal prosecutions, like parties to civil suits, should be bound by the judgments therein entered. When they fail to make timely objections to errors of the courts they must not be allowed at later times of their own choosing – often perhaps, after witnesses against them have become unavailable – to assert those grounds in post-conviction actions.

Arthur v. State, 483 S.W.2d 95, 97 (Tenn. 1972).

CONCLUSION

We conclude that the appellant failed to rebut the presumption of waiver as to all claims raised in his second petition for post-conviction relief which had not been previously determined. The trial court's decision to dismiss the appellant's petition without an evidentiary hearing

was neither improper nor premature. The judgment of the trial court is therefore:

AFFIRMED.

The appellant's sentence of death by electrocution is set for July 1, 1995, unless otherwise stayed by appropriate authority.

/s/ Paul G. Summers
PAUL G. SUMMERS, JUDGE

CONCUR:

/s/ John H. Peay
JOHN H. PEAY, JUDGE

/s/ David G. Hayes
DAVID G. HAYES, JUDGE

No. 99-5279

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY BRADFORD CONE, Petitioner-Appellant, v. RICKY BELL, WARDEN, Respondent-Appellee.	)	ORDER (Filed Jun. 22, 2004)

BEFORE: MERRITT, RYAN, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Norris would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

* Judge Gibbons recused herself from participation in this ruling.

Tenn. Code Ann. §39-2-205 (1982) (repealed) provides:

39-2-205. Review of death sentence. – (a) Whenever the death penalty is imposed for murder in the first degree and upon the judgment becoming final in the trial court, the defendant shall have the right of direct appeal from the trial court to the Tennessee Supreme Court, which shall have exclusive appellate jurisdiction, provided that the sentence of death shall be automatically reviewed by the Tennessee Supreme Court and said sentence review shall be consolidated for consideration with the direct appeal, if prayed for. If the defendant has been convicted of first-degree murder and sentenced to death and appeals that conviction and sentence, the record as to guilt and sentence shall be expeditiously filed with the Tennessee Supreme Court within the time limit provisions of Tennessee Rules of Procedure Rules 24 and 25. If the defendant has been convicted of first-degree murder and sentenced to death but does not appeal the conviction of first-degree murder, then the trial judge shall certify, within ninety (90) days after the judgment has become final, the record relating to punishment and the same shall be transmitted by the clerk of the trial court to the Tennessee Supreme Court. If the defendant has been convicted of other crimes at the same trial wherein a death sentence is imposed, the Tennessee Supreme Court shall have authority to review by direct appeal such other crimes if appealed by the defendant with the conviction of first-degree murder and sentence of death.

(b) The appeal of the conviction of first degree murder and the review of the sentence of death shall have priority over all other cases and shall be heard according to rules promulgated by the Tennessee Supreme Court. The Tennessee Supreme Court shall first consider any

errors assigned and then the court shall review the sentence of death.

(c) In reviewing the sentence of death for murder in the first degree, the Tennessee Supreme Court shall determine whether:

(1) The sentence of death was imposed in any arbitrary fashion;

(2) The evidence supports the jury's findings of a statutory aggravating circumstance or statutory aggravating circumstances;

(3) The evidence supports the jury's finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance or circumstances so found; and

(4) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant. The Tennessee Supreme Court may promulgate rules as it deems appropriate to establish such procedures as are necessary to enable it to properly review the death sentence.

(d) In addition to its other authority regarding correction of errors, the Tennessee Supreme Court, in reviewing the death sentence for murder in the first degree, is authorized to:

(1) Affirm the sentence of death; or

(2) Modify the punishment to life imprisonment.

(e) In the event that any provision of §§ 39-2-202 – 39-2-204, 39-2-206 or this section or the application

thereof to any individual or circumstance is held to be invalid or unconstitutional by the Tennessee Supreme Court or a federal court, so as permanently to preclude a sentence of death as to that individual, the court having jurisdiction over such individual previously sentenced to death shall cause such individual to be brought before the proper court which shall sentence such person to imprisonment for life.

SHELBY COUNTY – CRIMINAL

GARY BRADFORD CONE – PENITENTIARY

VS. B-74702-93 & 74898-99-900-902

STATE OF TENNESSEE

(EXHIBITS & CHARGE)

VOLUME 22 OF 22 VOLUMES

SENTENCING PHASE – MURDER FIRST DEGREE

Ladies and Gentlemen of the Jury, you have now found the defendant guilty beyond a reasonable doubt of Murder in the First Degree as charged in counts 1 & 2 of indictment numbers B74702 & B74703.

It is now your duty to determine within the limits prescribed by law, the penalty which shall be imposed as punishment for this offense. Section 39-2402, Sub-section (b), Tennessee Code Annotated, provides that a person convicted of Murder in the First Degree shall be punished by death or by imprisonment for life.

In arriving at this determination, you are authorized to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances which may have been raised by the evidence throughout the entire course of this trial, including the guilt finding phase or the sentencing phase or both. The Jury are the sole judges of the facts, and of the law as it applies to the facts in the case. In making up your verdicts, you are to consider the law in connection with the facts; but the Court is the proper source from which you are to get the law. In other words, you are the judges of the law as well as the facts under the direction of the Court.

The burden of proof is upon the State to prove any statutory aggravating circumstance or circumstances beyond a reasonable doubt to a moral certainty.

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily upon the certainty of your verdict. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty is not demanded by the law but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the verdict. The law makes you, the Jury, the sole and exclusive judges of the credibility of the witnesses and the weight to be given to the evidence.

Section 39-2404, Subsection (i), Tennessee Code Annotated, provides that no death penalty shall be imposed by a Jury but upon a unanimous finding of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

1. The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age or older.

2. The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use of threat or violence to the person.

   Robbery is the felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear.

3. The defendant knowingly created a great risk of death to two or more persons, other

than the victim murdered, during his act of murder.

4. The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.

5. The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

   "Heinous" means extremely wicked or shockingly evil.

   "Atrocious" means outrageously wicked and vile.

   "Cruel" means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless.

6. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.

7. The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb. Burglary is the unlawful breaking and entering a dwelling

house of another with intent to commit a felony therein.

8. The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.

9. The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or firearm, engaged in the performance of his duties.

10. The murder was committed against any present or former, judge, district attorney general or state attorney general, assistant district attorney general, or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupies or occupied said office.

11. The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official.

Section 39-2404, Sub-section (j), Tennessee Code Annotated, provides that in arriving at the punishment, the Jury shall consider as heretofore indicated, any mitigating circumstances which shall include but not be limited to the following:

1. The defendant has no significant history of prior criminal activity;

2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

3. The victim was a participant in the defendant's conduct or consented to the act;

4. The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;

5. The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

6. The defendant acted under extreme duress or under the substantial domination of another person;

7. The youth or advanced age of the defendant at the time of the crime;

8. The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

If you unanimously determine that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the State, beyond a reasonable doubt, and said circumstance or

circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. The Jury shall state in writing the statutory aggravating circumstance or statutory aggravating circumstances so found, and signify in writing that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found.

You will write your findings and verdict upon the enclosed form attached hereto and made a part of this charge. Your verdict should be as follows:

(1) We, the Jury, unanimously find the following listed statutory aggravating circumstance or circumstances;

(The Jury will then list the statutory aggravating circumstance or circumstances so found beyond a reasonable doubt).

(2) We, the Jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above.

(3) Therefore, we, the Jury, unanimously find that the punishment shall be death.

The verdict must be unanimous and each Juror must sign their name beneath the verdict.

If you unanimously determine that no statutory aggravating circumstance has been proved by the State beyond a reasonable doubt; or if the Jury unanimously determine that a statutory aggravating circumstance or circumstances have been proved by the State beyond a reasonable doubt; but that said statutory aggravating

circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. You will write your verdict upon the enclosed form attached hereto and made a part of this charge.

The verdict should be as follows:

"We, the Jury, unanimously find that the punishment shall be life imprisonment."

The verdict must be unanimous and signed by each Juror.

The Jury in no case, should have any sympathy or prejudice or allow anything but the law and evidence to have any influence upon them in determining their verdict. They should render their verdict with absolute fairness and impartiality as they think truth and justice dictate. Take the case, consider all the evidence fairly and impartially and report your verdicts to the Court.

/s/ James C. Beasley
JUDGE

Opposition Brief Unavailable for Filming at this Time